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Supreme Court of the United States

October Term, 1971

No. .....

OTIS L. BROWN, individually and as Director of the Department of Welfare and Institutions, State of Virginia; E. W. GREGORY, JR., individually and as Chairman of the Board of Welfare and Institutions, State of Virginia; MARY C. GRAY, VICTOR J. ASHE, S. S. FLYTHE, ELMER T. GRAY, L. H. IRBY, ROBERT P. TRICE, H. H. WHEELER, and ASHTON C. JONES, JR., individually and as members of the Board of Welfare and Institutions, State of Virginia; JUNE B. GOODE, individually and as Superintendent of Public Welfare of the County of Bedford, Virginia,

Petitioners,

v.

VIVIAN WOOLFOLK, individually and on behalf of her minor child, HELEN C. WOOLFOLK, and on behalf of all others similarly situated, by her mother and next friend, ORA MAXINE, WOOLFOLK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

Otis L. Brown, Director of the Department of Welfare and Institutions of the Commonwealth of Virginia on behalf

of himself and other named defendants, prays that a writ of certiorari, issue, to review the final judgment of the United States Court of Appeals for the Fourth Circuit entered on March 7, 1972, in the case of *Vivian Woolfolk, et al.* v. *Otis L. Brown, etc., et al.*

OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of Virginia, Richmond Division was entered on April 22, 1971, and is appended hereto as Appendix I; such opinion is reported at 325 F.Supp. 1162 (1971). The opinion of the Court below is not as yet reported, but is appended hereto as Appendix II.

JURISDICTION

The judgment sought to be reviewed was entered by the Fourth Circuit Court of Appeals on March 7, 1972. No order respecting a rehearing was sought nor has any application been made for an extension of time within which to petition for certiorari.

The jurisdiction of this Court to review the judgment in question, by writ of certiorari is found in 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

QUESTION PRESENTED

With an ever increasing welfare burden facing the states and the nation and with more and more emphasis being placed by Congress on encouragement of welfare recipients to seek gainful employment, did not the Court below err in holding that the states may not require employable recipients to otherwise work?

STATUTES INVOLVED

I.

Art. VI, cl. 2, Constitution of the United States

> "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the Supreme Law of the Land; . . . any thing in the Constitution or Laws of any State to the Contrary notwithstanding."

II.

Virginia Department of Welfare regulations § 211.4(E) and (F) of the Virginia Manual of Policy and Procedure for Local Welfare Departments, as superseded by § 305.4 (A) and (B) of the Virginia Manual of Policy and Procedure for Local Welfare Departments incorporating child care requirements as follows:

§ 211.4—Special Provisions Related To Employment

"E. *Evaluation of Employment Opportunities*—An applicant for or recipient of assistance is expected to make use of or develop resources available to him in relation to his capacity to do so. If it appears that he has a potential for employment, the extent of services needed from the worker will vary according to the individual's characteristics, training and working experience, as well as his environmental circumstances. The worker needs to be sensitive to the factors affecting the individual's ability to assume a worker role and to be aware of the point at which he may be expected to avail himself of working opportunities.

"A work opportunity is considered available to an individual, provided he is deemed able to assume a worker role, if the following conditions are met:

"1. *Availability of a Specific Job*—The availability to the particular individual of a specific job

within his competence must be established. The name and address of the prospective employer, the type of work, amount of wages and working hours must be recorded.

"2. *Physical and Mental Capacity*—The individual must be able, physically and mentally, to perform the duties of the job available to him. If there is doubt as to his physical or mental capacity to do the work, an evaluation of his condition is to be secured by the agency from the appropriate source, such as a physician or psychologist.

"3. *Suitability of the Job*—The job must not result in undue hardship, unreasonable changes in living arrangements, neglect of other responsibilities to members of the family, exposure to hazardous conditions, or adverse effect on school progress.

"F. *Refusal to Accept a Job*—Refusal by an otherwise eligible individual sixteen years of age and over to accept a work opportunity available to him under the conditions specified above renders him ineligible for assistance. If such an individual is a husband or parent living in the home, the wife or children are ineligible also.

"Income from employment shall be verified, if possible, by written evidence, such as income tax withholding forms or pay envelopes. If wages fluctuate, pay envelopes for a period of several months will be necessary. If the employment is of a seasonable or intermittent nature, it may be possible only to verify by the agency's knowledge of prevailing rates in the community. In this event, the record should reflect this information."

"§ 305.4 Special Provisions Related To Employment

"A. *Evaluation of Employment Opportunities*—An applicant for or recipient of assistance, other than

OAA, is expected to make use of employment opportunities available to him in relation to his capacity to do so. In evaluating the individual's ability to assume a worker role, the agency is to take into consideration his training, work experience, and environmental circumstances.

"A work opportunity is considered available to an individual if the following conditions are met:

"1. *Availability of a Specific Job*—The availability to the particular individual of a specific job within his competence is established.

"2. *Physical and Mental Capacity*—The individual must be able, physically and mentally, to perform the duties of the job available to him. If there is doubt as to his physical or mental capacity to do the work, an evaluation of his condition is to be secured by the agency from the appropriate source, such as a physician or psychologist.

"3. *Suitability of the Job*—The job must not result in undue hardship (e.g., excessively long working hours or wages below the prevailing rate in the community); unreasonable changes in living arrangements, neglect of other responsibilities to members of the family, exposure to hazardous conditions, or adverse effect on school progress. In ADC, there must be assurance that adequate child care will be provided during the caretaker's working hours.

"B. *Refusal to Accept a Job*—If an applicant for or recipient of OAA elects to be employed, income is to be counted as specified in Section 305.1. Refusal by other eligible individuals sixteen years of age and over to accept available work opportunities under the conditions specified above renders them ineligible for assistance. If such an individual is a husband or parent

living in the home, the wife or children are ineligible also.

"ADC may not be denied or terminated, however, on the basis of the caretaker's refusal to accept employment unless adequate and appropriate child care services are available, either through a service payment by the agency or, under an approved plan, at no cost. In ADC, if a stepfather refuses to accept available and suitable employment, his wife is no longer an eligible caretaker and must be removed from the assistance unit, but the children's eligibility is not affected.

"Because of the grave hardship which can result, action to deny or terminate assistance should be taken, in any case, only after careful exploration and an explanation to the individual of the consequences of his decision."

III.

42 U.S.C. § 602; 42 U.S.C. § 630; 42 U.S.C. § 632; and 42 U.S.C. § 633. Due to the length of the above provisions only the citations are set forth; the pertinent text is appended hereto as Appendix III. Additionally, the amendments to such statutes recently passed by Congress, Pub. Law 92-223 (HR 10604) known as the Talmadge Amendments, are set forth as Appendix IV. Such amendments which will be effective July 1, 1972, were presented to the Court of Appeals prior to its decision and do not moot the key issue presented—whether the Commonwealth has not only a right but also a duty to insure employable recipients are gainfully employed, taking into consideration the suitability of the specific job opportunities.

STATEMENT OF THE CASE

The instant suit was originally instituted by respondents in the United States District Court for the Eastern District

of Virginia, Richmond Division seeking a declaratory judgment and preliminary and permanent injunctive relief restraining the enforcement operation and execution by petitioner of work regulations of the Virginia Department of Welfare. Specifically, respondents challenged § 211.4(E)(F) of the Virginia Manual of Policy and Procedure for Local Welfare Departments, which regulations were, subsequent to the institution of the litigation amended and superseded by § 305.4(A)(B) of the Virginia Manual of Policy and Procedure for Local Welfare Departments. The new changes incorporated child care requirements and certain other changes but were, other than such changes, substantially identical to their predecessors, insuring specificity in evaluating suitability of employment. Federal jurisdiction was asserted pursuant to 28 U.S.C. § 1343(3) providing for original jurisdiction in suits authorized by 42 U.S.C. § 1983 and also 28 U.S.C. §§ 2201 and 2202 providing for declaratory judgment. Additionally, basis for jurisdiction was alleged under Art. VI, cl. 2 of the Constitution of the United States (the supremacy clause) the Due Process clause of the Fifth Amendment and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Respondents attacked the Virginia Work Rule as in conflict with the due process and equal protection clauses of the Fourteenth Amendment and with the Social Security Act 42 U.S.C. §§ 601-609, 630, *et seq.*, the regulation setting up an unauthorized additional requirement of eligibility for the Aid to Families with Dependent Children Program (AFDC) contrary to the statutory mandate that state plans must provide "aid . . . to all eligible individuals, ..." 42 U.S.C. § 602(a)(10); additionally, that the 1967 amendments to the Social Security Act incorporating

the Work Incentive Program, 42 U.S.C. §§ 630, *et seq.*, rendered the Virginia Work Rule (which Rule was approved as part of the state plan by HEW) invalid for the reason that it was in direct conflict with federal provisions and frustrated their effective implementation. A three judge court was convened to hear the matter but subsequently the panel remanded the issues to a single judge to determine the statutory questions involved, "being in the interests of judicial economy both at the trial and appellate level and consistent with the maxim that the decision of constitutional issues should be avoided." See *Rosado* v. *Wyman*, 397 U.S. 397, 25 L.Ed.2d 442, 90 S.Ct. 1207 (1970); *Swift & Co.* v. *Wickham*, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965).

With the constitutionality of the rules not at issue the single judge, on April 22, 1971, rendered his order and memorandum finding that plaintiffs were entitled to a declaratory judgment that the regulations were invalid for conflict with provisions of federal statute and were thus preempted due to the supremacy clause. See *Swift & Co.* v. *Wickham, supra.* Timely appeal was noted to the Circuit Court and the cases were briefed and oral argument was had on November 1, 1971. On March 7, 1972, the United States Court of Appeals for the Fourth Circuit handed down its opinion affirming that of the lower court and holding that the Virginia Work Rule was directly in conflict with the WIN sections of the Social Security Act in that (1) it applied to those deemed "inappropriate" for referral to WIN and (2) provided, upon refusal of employment by an AFDC beneficiary, for termination of payments to the entire family unit rather than merely to the recipient turning down employment. The order of the Court was applicable to the regulations embodied in § 305.4(A)(B).

Not at issue in the instant petition nor at issue in the Court of Appeals is the District Court's ruling as applied to the specific factual circumstances of the named original plaintiffs, Vivian Woolfolk and her minor child and the subsequent intervenors, Rosetta, Gayle and Vera Calloway, and their minor children. Consequently, a detailed factual summary is not necessary.

In issue is that provision of the Virginia Work Rule which provides as a penalty for refusal of employment termination of the entire family grant rather than, as provided in the WIN program, termination only of the portion of the grant of the recipient turning down employment. Though the State stresses that some incentive for employment is mandatory, and under the WIN regulations if the recipient has already had the grant partially terminated there is no further incentive for the State to require employment, if the Court finds that the sanctions of the Virginia Work Rule frustrate the working of the federal programs it would not be difficult for the State to make such sanctions compatible. The State is not to be misunderstood as abandoning the contention that such sanctions are valid, but the State key interest and specific challenge is the ruling of the Court that Virginia is unable to relieve its welfare burden by requiring employable recipients, deemed "inappropriate" for WIN for a number of reasons, to accept gainful employment. The question before this Court is the correctness of the Circuit Court's preemption ruling, which is a question of law. Factual statements needed relate only to the operation of the two plans and are set forth in the argument.

ARGUMENT

The Implementation Of The Virginia Work Rule To Those Found "Inappropriate" To The Work Incentive Program Does Not Stand As An Obstacle To Congress' Objectives In Executing The Program.

This Court has consistently upheld the rights of states to allocate their welfare resources. *King* v. *Smith,* 392, U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968). It has further specifically condoned as a legitimate state interest the encouragement of employment and the avoidance of discrimination between welfare families and families of the working poor. *Dandridge* v. *Williams,* 397 U.S. 471, 486, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). Yet the courts below in the instant case have paralyzed the Commonwealth and condoned not employment but idleness, all contra to the legitimate interest of the Commonwealth. The impact of this ruling upon the Commonwealth and its potential national impact is such that it is imperative that this Court grant certiorari and reverse the decision of the lower court.

In determining the precise legal issue presented that of preemption—the courts have seen fit to use numerous terms; comprehensiveness or occupying the field is the term relied upon by respondents. However, one need look no further than this Court's recent ruling in *Perez* v. *Campbell,* 402 U.S. 637, 91 S.Ct. 1704, 20 L.Ed.2d 233 (1971) to ascertain the proper application of the preemption doctrine. The Court stated simply that "[d]eciding whether a state statute is in conflict with a federal statute and hence invalid under the supremacy clause is essentially a two step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." While this Court and, as indicated, numerous lower courts have made use of such terms as: conflicting; contrary to; occupying the field; repugnance; difference;

irreconcilability; inconsistency; curtailment; and interference; the true test in the final analysis is for this Court, as set down by *Perez,* to determine whether the challenged state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Perez* v. *Campbell, supra,* citing *Hines* v. *Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941); *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 10 L.Ed.2d 248, 83 S.Ct. 1210 (1963), where all justices accepted the *Hines* test; *Colorado Anti-Discrimination Commission* v. *Continental Airlines, Inc.,* 372 U.S. 714, 722, 10 L.Ed.2d 84, 83 S.Ct. 1022 (1962). Any assertion that WIN is so comprehensive that it occupies the field and thus "coincidence is as ineffective as opposition . . ." [See *Pennsylvania* v. *Nelson,* 350 U.S. 497, 504 (1956)] has been clarified by this Court in *California* v. *Zook,* 336 U.S. 725 (1949) where the Court stated, consistent with its ruling in *Perez,* that "coincidence is only one of many factors in a complicated pattern of facts guiding us to congressional intent." The ". . . question can be resolved only by careful scrutiny of the particular activity regulated."

Petitioner would emphasize that the particular activity regulated herein by the Commonwealth is work. The ability of the Commonwealth of Virginia and any other state to relieve its welfare burden by insuring that employable recipients, with a legal duty of support, seek gainful employment is the reason such activity is regulated. Such a goal is clearly consistent with the state objectives approved in *Dandridge* v. *Williams, supra.;* that of encouraging employment and in avoiding discrimination between welfare families and families of the working poor. The WIN program determines that certain individuals are "inappropriate" for work, for reasons clearly associated with their ability to work, for example a child attending school full

time or an individual with an illness or incapacity. Others, however, are deemed "inappropriate" for reasons in no way associated with their ability to be employed, for example one who is remote from an established WIN project and thus cannot effectively participate while an employment opportunity may exist right *in* his own community. Another example might be an individual who volunteered for WIN but was found to be untrainable, yet such individual is perfectly capable of performing a menial task that does not require training. To limit the Commonwealth in its objectives, as the lower court has done, and state that employable recipients deemed "inappropriate," such as those in the latter categories, may maintain a dole status without the concomitant duty to accept available employment clearly undermines the legitimate State interest in encouraging employment, and clearly discriminates between the working poor who must strive to earn a living while other employable persons do not have to seek gainful employment but instead are financed by others' tax monies.

Also it must be emphasized that the State in requiring gainful employment by implementing its work rule is, as this Court emphasized in *King* v. *Smith, supra,* in compliance with the Social Security Act which requires that in determining need the State agency "shall . . . take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . ." 42 U.S.C. § 602(a)(7). The Commonwealth in implementing the Work Program is not, as outlawed by *King* v. *Smith,* penalizing an individual for resources which are merely *assumed* to be available, but is determining that the individual has a specific job available within his or her competence. See § 305.4(A)(1).

With this background any court must be clearly convinced with a high degree of proof that Congress intended

preemption of the area. *Federal Preemption: Governmental Interests in the Role of the Supreme Court,* 1966 Duke L.J., 484 (1966). To reach the precise legal question therefore, one must look at WIN and what it is designed to do. One cannot, it is emphasized, take the approach of the lower court that because the Virginia Work Rule places the recipient in employment in an imprecise and summary fashion it is inconsistent with a comprehensive regulation of WIN which carries a full range of programs designed to be of substantial permanent benefit to the individual. Such an approach, adopted by both lower courts, is not adopted by looking to the true doctrine of preemption but by erroneously looking at the manner in which the Virginia Work Rule is administered and indicating that a better system could be devised. "[T]he intractable economic, social, and even philosophical problems are not the business of [the] Court." *Dandridge* v. *Williams, supra,* at 487.

One encounters a massive entanglement of bureaucratic statutes, rules, regulations and implementing procedures when attempting to determine the construction of the federal statutes in question, 42 U.S.C. § 602, *et seq.* (wherein the requirement for referral to WIN is found) and § 630, *et seq.* (WIN program itself). Setting aside this massive entanglement and separating the wheat from the chaff, the issue is, simply stated, what is WIN and what is it intended to do.

There is not presented in this case an interpretation of the Federal Constitution, nor any constitutional question relating to the allegations raised by the plaintiffs in the lower court regarding the unfairness of the Virginia Work Rule as compared with the WIN program. Any issues as to the alleged unfairness or unequal treatment of WIN recipients as compared with those to whom the Virginia Work Rule is applied, raise constitutional questions which

the lower court found unnecessary to meet. There is only a question of comparing two statutes, one state, the other federal, to determine if the former is an "obstacle to the latter." There is lacking any substantive question of construction of a provision of the Federal Constitution.

WIN is basically the following: In 1967 the Social Security Act was amended to provide that States, such as Virginia, participating in the Aid to Families with Dependent Children Program (AFDC) were required to establish a work incentive program (WIN) (42 U.S.C. § 402(A)(19), et seq.), for the purpose of requiring:

> ". . . the establishment of a program utilizing all available manpower services, including those authorized under other provisions of law, under which individuals receiving aid to families with dependent children will be furnished incentives, opportunities, and necessary services in order for (1) the employment of such individuals in the regular economy, (2) the training of such individuals for work in the regular economy, and (3) the participation of such individuals in special work projects, thus restoring the families of such individuals to independence and useful roles in their communities. It is expected that the individuals participating in the program established under this part will acquire a sense of dignity, self-worth, and confidence which will flow from being recognized as a wage-earning member of society and that the example of a working adult in these families will have beneficial effects on the children in such families." (42 U.S.C. § 630.)

The Talmadge amendments substituted "public service employment" for "special work projects" in the third objective, thus not materially altering the program but still, as discussed below, keeping with the objectives of employment orientation, rather than the previous training oriented program as originally designed.

As plaintiffs indicated in the lower court, establishment of such a program is a prerequisite to federal approval of the State AFDC plan and provisions in the State plan must be made for referral to WIN of all appropriate AFDC recipients. 42 U.S.C. § 602(19). WIN programs are established in the Commonwealth by the Secretary of Labor who is given discretion in designating the areas in which he feels there is a significant number of individuals who are attained age sixteen (16) and are receiving AFDC funds. 42 U.S.C. § 632. The programs are not set up extensively throughout the Commonwealth and in fact have been established slower than anticipated.

Individuals enter the WIN program through referral from the local Department of Welfare. The Department makes a referral if it determines that any of the adults or children over sixteen whose needs are considered in the AFDC grant are "appropriate" for placement in the program and whether there are suitable child care facilities available so that the mother or other caretaker relative can perform work or receive training. Statutory exceptions from referral into the WIN program are made for: (1) a person with illness, incapacity or advanced age; (2) a person so remote from any project established under WIN that he cannot effectively participate in any program; (3) a child attending school full time or (4) a person whose presence in the home is required on a continuous basis because of illness or incapacity of another member of the household. 42 U.S.C. § 602(a)(19)(A)(iv)(v)(vi)(vii).

Exceptions are now made also for a mother or other relative of a child under the age of six (6) who is caring for such child; a child under age sixteen (16); the mother or other female caretaker of a child, if the father or another adult male relative is in the home and is not within one of

the exceptions—in other words only one spouse would have to work. 42 U.S.C. § 602(a)(19)(A)(i)(v)(vi).

Once entered into the WIN program, the AFDC recipients while still receiving aid come under the auspices of the agent of the Department of Labor, which is the Virginia Employment Commission (V.E.C.). The V.E.C. conducts WIN in a three-part program which either (1) places individuals in existing jobs in the regular economy where such jobs will lead to economic self-sufficiency and are consonant with the individual's desires and qualifications; (2) provides job training leading to economic independence and self-sufficiency to those who are capable of benefiting from such training; and (3) establishes publicly financed special work projects for those individuals for whom work in the regular economy cannot be found and who are not capable of benefiting from job training; such work projects have not as yet been established in the Commonwealth of Virginia, 42 U.S.C. § 630, and now will not be since "public service" programs are to be established.

The WIN program does establish a comprehensive framework of procedures and safeguards in work and training incentives designed to achieve the statutory purpose of preparing appropriate AFDC recipients for meaningful employment leading to self-support. Adequate child care for working mothers is required; testing, counseling and evaluation to determine individual capacity; preparation of an "employability plan" for each person referred; monetary training, and work incentives through income exemption formulas; special orientation; basic education; training; counseling, and follow-up beyond that ordinarily furnished by the federal-state employment services are also required. Additionally, the recipient referred to WIN by the Department of Welfare is entitled to a fair hearing on the appropriateness of his or her referral; a separate hearing on

the issue of good cause for refusal to accept employment or training after referred to WIN is also required, which hearing is held by the Department of Labor.

Not only does 42 U.S.C. § 602(19)(A) require prompt referral to the work incentive program of those found appropriate as discussed above, but further, referral of any other person who after being informed of the work incentive program, volunteers. A referral to WIN of an individual volunteering would *not* be made only upon a finding that such referral would be "inimical to the welfare of such person or the family." However, once in the program, such individual can be discontinued from WIN if the Department of Labor determines that he is unsuitable for training or there are no work opportunities for such individual.

The state regulation involved does, concededly, not have the detailed comprehensiveness of the WIN program, and additionally has broader sanctions than WIN. Sanctions under WIN are that an individual who refuses a referral or refuses to accept a job after being referred to WIN and has not good cause for refusing such referrals, will have his AFDC grant diminished by the amount assigned to his needs only; whereas, under the Virginia Work Rule, the entire grant is cancelled if it is found that work is unreasonably refused. As previously indicated, if such sanctions are found to be an "obstacle" to WIN it is of little moment, to conform the Virginia Work Rule as to sanctions. It is really, as seen infra, the inability of the Commonwealth, due to the court's ruling, to place individuals deemed "inappropriate" but still employable, into the work force, that is the crux of the instant petition. Yet it is hard to see how broader sanctions are an obstacle since as will be seen, they are applied only subsequent to WIN.

The Virginia Work Rule further does not have the training and counseling provisions of WIN and attempts to place individuals directly into employment situations. Consequently individuals are, in some cases referred to employment categorized as menial labor. WIN on the other hand is not designed to refer enrollees to low paying jobs. Under the Virginia Work Rule the physical and mental capacity of an individual and the suitability of the job are considered prior to application of the rule. Fair hearing procedures from these determinations are provided consistent with the requirements of *Goldberg* v. *Kelly*, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970).

Comparisons between the WIN program and the Virginia Work Rule could be set out in greater and extensive detail. However, this Court in determining the sole question of pre-emption before it, need not be burdened with such detail. For the fact is that the Virginia Work Rule is not applied to either those found appropriate for WIN [42 U.S.C. § 602(19)(a)(A)(i)(ii) now 42 U.S.C. § 602(a)(19)(A)] or those who volunteer for the program [42 U.S.C. § 602(a)(19)(A)(iii) now 42 U.S.C. § 602(a)(19)(A) in reality limited to mothers with children under the age of six (6)]. It is applied only to (1) those who are found inappropriate for WIN and thus no referral is made, or (2) those referred to WIN but who drop out of the WIN program by either (a) refusing to accept suitable employment, or (b) are found by the Secretary of Labor to be not employable or trainable. Only then is the Virginia Work Rule applied.

A typical example of the applicability of the Virginia Work Rule is an individual found inappropriate for WIN because under 42 U.S.C. § 602(19)(A)(v), now (A)(iii), he is so remote from any of the projects under the work incentive program established by the Secretary of Labor

that he may not effectively participate under any such program. Under the procedure established and the manner of administering the Virginia Work Rule, if a job would nonetheless be available in the locality which is remote from an established WIN program, then the work rule would be applied and such individual would be placed in the work force.

The Commonwealth, therefore, does not ignore in any manner the detailed mandate of the WIN program, nor does the Commonwealth attempt in any manner to avoid furnishing the beneficial services and procedural protections WIN requires. On the contrary, the mandates of WIN are followed for each and every individual found appropriate for referral to the program. Only after full implementation of WIN is attempted for each and every individual and such implementation fails, does the applicability of the Virginia Work Rule come into play.

As this Court recounted in *King* v. *Smith, supra,* and as further explained in *X.* v. *McCorkle,* 333 F.Supp. 1109 (D. N.J., 1970), the amendments to the Social Security Act in 1968 and thereafter have looked toward the final goal of providing incentives for welfare recipients to seek employment. A concerted Congressional effort was made to insure that applicants and recipients would not find it more advantageous to remain on welfare than to seek employment. One of the first steps in achieving that goal was the 1968 amendment incorporated in the "income disregard" provisions as set forth in 42 U.S.C. § 602(a)(8). Again, the recent Talmadge amendments which are linked to the amendments of The Revenue Act of 1971, Pub. Law 92-178, H.R. 10947, placed emphasis on work orientation. This is amplified in the report from the Committee on Finance submitted with the amendments which provide a job develop-

ment investment credit. Such report is appended hereto as Appendix V. As explained in such report:

> "The Work Incentive Program was created by the Congress in 1967 as an *attempt* to cope with the problem of rapidly growing dependency on welfare by providing recipients with the training and job opportunities needed to help them become economically independent. Unfortunately, the results have been disappointing, and few participants in the Work Incentive Program have been placed in employment following completion of participation in the program.
>
> "The major single criticism of the Work Incentive Program is that it has not placed welfare recipients in jobs. The reason for this is that well over *ninety percent* of the enrollees in the program are taking classroom-type classes rather than employment-based training. Two basic kinds of employment-based training are authorized under present law: on-the-job training with private employers and public service employment in created public jobs. These must be given in much higher priority if welfare recipients are to be employed rather than put into training programs leading nowhere.
>
> "The committee bill provides this job-related emphasis. In addition, it establishes a job development tax credit for employment of Work Incentive Program participants which is designed to open up job opportunities for welfare recipients. Other provisions are designed to strengthen the administrative framework of the Work Incentive Program so as to make participants ready for the jobs when the jobs are ready for them."

Continuing, the report indicated the tentativeness and experimental nature of WIN, indicating:

> "A number of other amendments are included in the bill to make the Work Incentive Program more *employment-oriented*, to develop job opportunities for participants in the program and to improve the administrative framework of the program in order to increase its

effectiveness in placing participants in jobs. These features are necessary because the Work Incentive Program *continues* to suffer from the problem of participants finishing their training without jobs being available. At the end of August 1971, for example about 25,000 participants had completed training; 37 percent of them were in a 'holding' category because a job could not be found. The number of persons in this 'holding' category has more than doubled in one year, from 4,290 at the end of August 1970 to 9892 at the end of August 1971.

* * *

"Other provisions of the bill would mandate coordination between the Departments of Labor and Health, Education, and Welfare; would increase the federal matching share for training under the program for 80 percent to 90 percent; would specify an allocation formula for distribution of funds under the Work Incentive Program among the states; and would require on a State-by-State basis that at least 15 percent of the registrants for the Work Incentive Program be enrolled in the program each year." (Emphasis supplied.)

Under the Talmadge amendments all "appropriate" persons, other than those listed in the exceptions, must be registered with the Secretary of Labor or his designee which in the instant case is the Virginia Employment Commission. It is then up to both Labor and Welfare to insure that at lease 15 percent of the registrants are enrolled in the program each year and are placed in gainful employment in accordance with the priority established, *i.e.,* (1) unemployed father; (2) dependent children and relative age sixteen and over who are not in school, working, or in training; (3) mothers who volunteer for participation; and (4) all other persons. One would expect arguments that the program is now even more comprehensive and predominates the field more than the previous laws. This simply is incorrect.

Clearly, more and more, since 1968, the federal government has stressed job orientation. There now exists a mandate to require at least a minimum of 15 percent of registrants to be enrolled and placed in gainful employment. Once all "appropriate" individuals are registered and a joint appraisal made (by Labor and Welfare) of their readiness for employment, such individuals are placed into the labor market only when a request for certification is made by the Department of Labor, which, with Health, Education and Welfare is under the mandate of the 15 percent rule. However, the penalties under the 15 percent rule fall only upon welfare and one is hard pressed to believe that Congress intended, as the lower court held, for welfare to stand by and job opportunities go by awaiting requests for certification from the Department of Labor. Virginia, like all other States, will certainly cooperate to the fullest extent possible to try to insure that the objectives of Congress are satisfied. Such objectives, the encouragement of employment, are the same objectives recognized by this Court as one of the most important legitimate state interests in today's society. The encouragement of employment leads to the reduction of welfare costs and the avoiding of discrimination between welfare families and families of the working poor; further legitimate interests under the new amendments as under the old, is the state required to sit by and permit the mother of a child to stay home to care for such child since the father is working, the family still receiving welfare, while at the same time those of the working poor not on welfare are by sheer economic necessity required to have both spouses employed? The Commonwealth asserts that assuming proper child care can be obtained there is no reason and in fact there is a duty upon the State to insure that all individuals, whether exempted or not, are placed in gainful employment. Under the rulings of the lower court this is impossible. An

individual, as previously indicated, can be "so remote from a Work Incentive project that his effective participation is precluded" and yet there may be a job opportunity, albeit menial, easily accessible and within his physical and mental capacity. Yet under the lower court ruling the State may not require such individual to work and he may continue to be eligible for receipt of welfare benefits, while at the same time one similarly situated but not on welfare is diligently engaged in such menial labor.

Similarly, under the exceptions now listed, the ruling of the lower court would prohibit the Commonwealth from requiring mothers with children under the age of six, to seek gainful employment even though adequate child care facilities would be available. The Commonwealth asserts it does not frustrate WIN to require such individuals to work when, regardless of the wisdom of federal policy that such individuals volunteer only, the State policy is that such an individual should be placed into the work force at age 18 or 19 when readily trainable, rather than at 42 or 45 when they are above child bearing age and are not readily trainable. It is not hypothesizing to bring such examples to light, for the Fourth Circuit clearly stated that in their opinion Congress "did not intend that 'inappropriate' per sons should be compelled to work in any way." It is sub mitted that the findings of the lower court are clearly contra to established objectives of Congress throughout the past four to five years—that of employment orientation and are further contra (since the Virginia Work Rule is applicable only to those not participating in WIN) to the clear mandate of this Court that preemption is applicable only if there is a finding that the State regulation stands as an obstacle to the accomplishment and execution of the objectives of Congress. The Court need not determine if there are varying *purposes* for WIN and the Work Rule. Nor should the

Court concern itself with the wisdom of either the federal or State policies. Only the *effect* of the Work Rule upon the federal legislation need be considered. And only one conclusion can be drawn from such consideration: if the Work Rule does not even become applicable until after WIN is implemented it could not be determined that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Perez* v. *Campbell*, *supra*. It is not for this Court to determine the wisdom of the federal or state legislation. It is only for this Court to determine if the State policy, that of trying to encourage all employable recipients to obtain gainful employment, stands as an obstacle to the accomplishment and objectives of Congress.

CONCLUSION

The AFDC program of this and every other state is to assist unfortunate families to upgrade their social and economic position. WIN was and is an aid to such policy with its extensive training and employment programs. However, it must be remembered that the WIN program was not and is not totally comprehensive. It operated only in the designated areas established by the Secretary of Labor and developed at a slower pace than originally planned. Now a mandate of a minimum 15 percent employment goal is sought. In fact WIN now serves in the nation only 180,000 of the more than two million families receiving welfare assistance. To adopt the position of the lower court that the only manner of placing AFDC recipients into the labor force is through WIN, is to relegate the remaining 1.8 million recipients to positions of idleness, further loss of dignity and pride and further removal from the mainstream of the American economic and social realities. Hopefully there will come a time when these people will be presented with op-

portunities to become productive citizens and hopefully it will be through a full implementation of the WIN program with complete training. In the meantime, their experiences through the Virginia Work Rule will certainly do more to assure them success than will idleness and dependency. No employment is demeaning; any work is noble. Work allows a family to be assisted in maintaining its pattern of normalcy rather than allow it to disrupt and become completely dependent upon the state for its survival. We find nothing in the Constitution or the laws of the United States that permit or encourage such dependency and respectfully request that this Court find the lower court erred in determining that the WIN program was so comprehensive that it preempted the Virginia work regulations.

Respectfully submitted,

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CERTIFICATE

I, Anthony F. Troy, Assistant Attorney General of the Commonwealth of Virginia, a member of the bar of the Supreme Court of the United States, and one of counsel for petitioners, hereby certify that a copy of the foregoing Petition for Writ of Certiorari to Judgment of United States Court of Appeals for the Fourth Circuit was on this the 2nd day of June, 1972, mailed to John M. Levy, Esq., 10 South Tenth Street, Richmond, Virginia 23203, and to Douglas Broadwater, Esq., 401 W. 117th Street, New York, New York 10027, counsel of record for respondents. All parties required to be served have been served.

ANTHONY F. TROY
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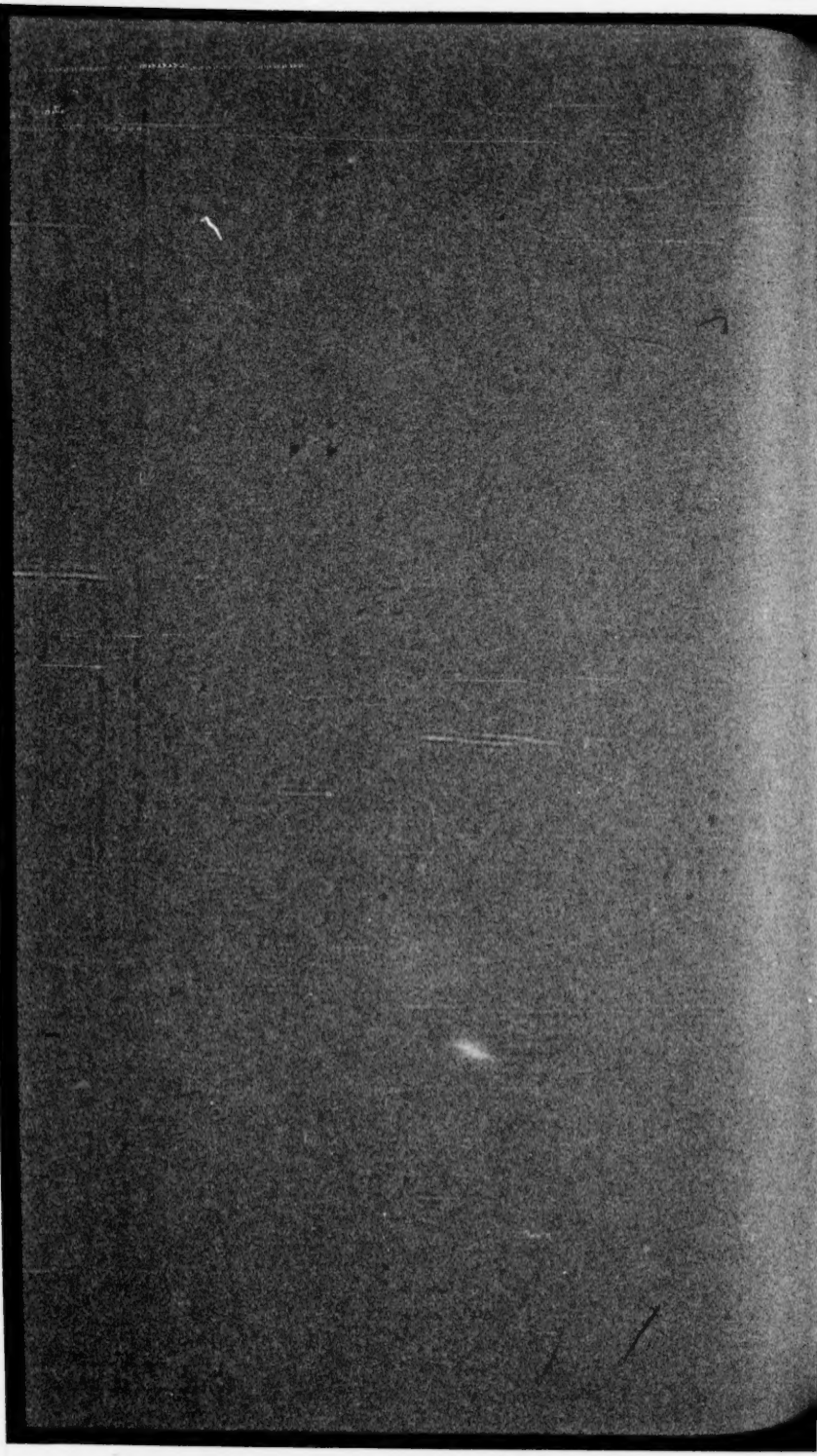
APPENDIX



APPENDIX I

Filed, April 22, 1971
Clerk, U.S. District Court
Richmond, Virginia

In The United States District Court
For The Eastern District Of Virginia
Richmond Division

Civil Action No. 225-70-R

Vivian Woolfolk, et al.,

v.

Otis L. Brown, etc., et al.,

MEMORANDUM

This is a class action challenging certain regulations and practices of Virginia officials charged with the duty of administering the State's plan of Aid to Families with Dependent Children (AFDC), a public assistance program funded jointly by the federal and state governments. The four named plaintiffs are mothers who at various times received AFDC payments for the support of themselves and their children. These payments were terminated in full pursuant to a provision in the state public assistance plan concerning refusal to accept an offer of employment. Defendants are the Director of the Department of Welfare

and Institutions, the Chairman and members of the Board of Welfare and Institutions, the Superintendent of Public Welfare of Bedford County, Virginia, and the Chairman and members of the Local Welfare Board of Bedford County. This is a class action pursuant to Rule 23(b)(2), the named plaintiffs representing parents and their children, eligible for AFDC benefits under Virginia's program and subject to the employment regulation discussed below.

On April 23, 1970, Chief Judge Haynsworth, pursuant to the request of the author of this opinion, designated Circuit Judge Butzner and District Judge Kellam to sit on a three-judge panel in the case. On April 28, 1970, this Judge entered a temporary restraining order requiring the continued provision of assistance to the individual plaintiff, Woolfolk, until the full panel reached its decision.

For reasons which will appear, the panel has decided to remand the statutory issues, including supremacy clause questions, to this Judge sitting alone, with an eye to the possibility that the dispute can be resolved without treating the Constitutional issues. *Rosado* v. *Wyman,* 397 U.S. 397, 403 (1970).

The plaintiffs contend that §§ 211.4E and F of the Virginia Manual of Policy and Procedure for Local Welfare Departments are in conflict with the due process and equal protection clauses of the Fourteenth Amendment and with the Social Security Act, 42 U.S.C. §§ 601-609, 630, et seq. The suit is brought under 42 U.S.C. § 1983. Jurisdiction lies in this Court, regardless of the amount in controversy, under 28 U.S.C. § 1343(3). *Caulder* v. *Durham Housing Authority,* 433 F.2d 998 (4th Cir. 1970).

The regulation in question reads as follows:

E. *Evaluation of Employment Opportunities*—An applicant for or recipient of assistance is expected to make use of or develop resources available to him in relation to his capacity to do so. If it appears that he has a potential for employment, the extent of services needed from the worker will vary according to the individual's characteristics, training and working experience, as well as his environmental circumstances. The worker needs to be sensitive to the factors affecting the individual's ability to assume a worker role and to be aware of the point at which he may be expected to avail himself of work opportunities.

A work opportunity is considered available to an individual, provided he is deemed able to assume a worker role, if the following conditions are met:

1. *Availability of a Specific Job*—The availability to the particular individual of a specific job within his competence must be established. The name and address of the prospective employer, the type of work, amount of wages and working hours must be recorded.

2. *Physical and Mental Capacity*—The individual must be able, physically and mentally, to perform the duties of the job available to him. If there is doubt as to his physical or mental capacity to do the work, an evaluation of his condition is to be secured by the agency from the appropriate source, such as a physician or psychologist.

3. *Suitability of the Job*—The job must not result in undue hardship, unreasonable changes in living arrangements, neglect of other responsibilities to members of the family, exposure to

hazardous conditions, or adverse effect on school progress.

F. *Refusal to Accept a Job*—Refusal by an otherwise eligible individual sixteen years of age and over to accept a work opportunity available to him under the conditions specified above renders him ineligible for assistance. If such an individual is a husband or parent living in the home, the wife or children are ineligible also.

Income from employment shall be verified, if possible, by written evidence, such as income tax withholding forms or pay envelopes. If wages fluctuate, pay envelopes for a period of several months will be necessary. If the employment is of a seasonable or intermittent nature, it may be possible only to verify by the agency's knowledge of prevailing rates in the community. In this event, the record should reflect this information.[1]

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[1] In July of 1970, the regulation was superseded by § 305.4 of the Virginia Manual of Policy and Procedure for Local Welfare Departments, incorporating child care requirements and certain insubstantial changes:

305.4 Special Provisions Related To Employment

A. *Evaluation of Employment Opportunities*—An applicant for or recipient of assistance, other than OAA, is expected to make use of employment opportunities available to him in relation to his capacity to do so. In evaluating the individual's ability to assume a worker role, the agency is to take into consideration his training, work experience, and environmental circumstances.

A work opportunity is considered available to an individual if the following conditions are met:

1. *Availability of a Specific Job*—The availability to the particular individual of a specific job within his competence is established.
2. *Physical and Mental Capacity*—The individual must be able, physically and mentally, to perform the duties of the job available to him. If there is doubt as to his physical or

Evidence has been presented in the form of depositions, exhibits, and answers to interrogatories, and the case has been submitted for decision after argument and briefing.

After hearing, the Court invited the United States to state its views on the issues as amicus curiae. The Government brief and the parties' responses thereto have been received and studied.

The plaintiffs contend that the regulation, which shall be referred to as the Virginia work rule, sets up an unauthorized additional requirement of eligibility for AFDC, contrary to the statutory mandate that state plans provide

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mental capacity to do the work, an evaluation of his condition is to be secured by the agency from the appropriate source, such as a physician or psychologist.

3. *Suitability of the Job*—The job must not result in undue hardship (e.g., excessively long working hours or wages below the prevailing rate in the community); unreasonable changes in living arrangements, neglect of other responsibilities to members of the family, exposure to hazardous conditions, or adverse effect on school progress. In ADC, there must be assurance that adequate child care will be provided during the caretaker's working hours.

B. *Refusal to Accept a Job*—If an applicant for or recipient of OAA elects to be employed, income is to be counted as specified in Section 305.1. Refusal by other eligible individuals sixteen years of age and over to accept available work opportunities under the conditions specified above renders them ineligible for assistance. If such an individual is a husband or parent living in the home, the wife or children are ineligible also.

ADC may not be denied or terminated, however, on the basis of the caretaker's refusal to accept employment unless adequate and appropriate child care services are available, either through a service payment by the agency or, under an approved plan, at no cost. In ADC, if a stepfather refuses to accept available and suitable employment, his wife is no longer an eligible caretaker and must be removed from the assistance unit, but the children's eligibility is not affected.

Because of the grave hardship which can result, action to deny or terminate assistance should be taken, in any case, only after careful exploration and an explanation to the individual of the consequences of his decision.

that "aid . . . shall be furnished with reasonable promptness to all eligible individuals," 42 U.S.C. § 602(a)(10).

They argue additionally that certain 1967 amendments to the Social Security Act incorporating the Work Incentive Program (hereinafter WIN), 42 U.S.C. § 630, et seq., and regulations promulgated thereunder, render the Virginia work rule invalid for the reason that it is either in direct conflict with federal provisions or would frustrate their effective implementation.

The parties have stipulated that the Woolfolk plaintiffs were qualified to receive AFDC benefits during August of 1969, and they were also so qualified at the time of suit but for Vivian Woolfolk's failure to accept an employment opportunity. The Calloway plaintiffs, it is also stipulated, received aid from August, 1969, until April 30, 1970, and were qualified for aid at the time of suit but for the failure of Rosetta, Vera, and Gayle Calloway to accept a job offer. Terminations of aid were made pursuant to the Virginia work rule. It is further stipulated that Bedford County, where the four named plaintiffs reside, participates in the WIN program and that vacancies in the program for that area existed from August 1969 to May 1970.

The scope and effect of the Virginia work rule as applied appeared from the evidence. The rule was promulgated prior to the enactment of the legislation incorporating the WIN program (Brown depos., 4). It was adopted in May, 1967 (defendants' Exhibit 3), in response to the requirement of the Department of Health, Education and Welfare that, in determining a particular individual's need for AFDC payments, only actual income could be taken into consideration as an available resource. See 45 C.F.R. § 203.1(b). Rather than presuming certain unearned income to be available as a resource, it was decided to rule ineligible those

who refused suitable, available employment. The new regulation was submitted to and accepted by a family service representative in the Charlottesville, Virginia, regional office, on June 21, 1967 (defendants' Exhibit 4).

The Virginia work rule is not satisfied by part time employment (Brown depos., 39). "Appropriate" day care for children must be afforded (*Id.*, 40). The job itself need only be "appropriate work, and work that is available." (*Id.*, 42). Compensation need only be "commensurate with similar type employment available to the free working person in that community," (*Id.*, 48; see also Armstrong depos., 76).

The sanction of termination of all AFDC payments, to parent and child alike, is imposed because it is thought to be a greater motivator to secure employment than a lesser deduction (Armstrong depos., 71). No particular information forms are used in the termination process (*Id.*, 61). A detailed investigation of working conditions, beyond wages and hours, is not made (*Id.*). Although the rule admonishes welfare officials to cancel benefits only after consultation, no specific period of counseling is required (*Id.*, 74).

The eligibility technician in charge of Vivian Woolfolk's case testified that she presented the case to the local welfare board for termination after Miss Woolfolk had failed on the appointed day to appear for employment for reasons which "didn't seem too valid." (Carson depos., 77). On Sunday, September 14, 1970, Miss Woolfolk's work was to commence. On Thursday, the 18th, she appeared at the welfare office and explained that she had had a sore throat on Sunday. No inquiry was made to determine whether the job offer was still open on Thursday. Nor was Miss Woolfolk informed that a cutoff of her benefits was being considered at that visit or at a subsequent one later on Thursday, when

she reported with a doctor's certificate stating that she could not work the next day. (*Id.*, 77-79). On Friday, September 19th, her case was closed by the welfare board, thereby terminating benefits to her and her child.

The Superintendent of the Bedford County Welfare Department was chiefly responsible for offering Miss Woolfolk an employment opportunity (Goode depos., 7). The job involved babysitting for one small child all day, responsibility for four others, aged eight through seventeen, from about 3:30 until 5:00 p.m., serving dinner, and washing dishes. The pay was $20.00 per week, plus five days' room and board. Miss Woolfolk would live in a house trailer on the property, and if she did not desire to bring her daughter, Helen, with her, the child would be left with her grandmother. To the superintendent's knowledge, Miss Woolfolk's prior work experience was restricted to babysitting (*Id.*, 13). The employment offer was made for that reason and on account of its proximity to Miss Woolfolk's home, in view of her lack of transportation (*Id.*, 41). It was made prior to any visit to the job site (*Id.*, 31) or examination of the living arrangements (*Id.*, 33).

It was the general practice of the Bedford welfare office to keep a list of available jobs on hand and to offer positions deemed suitable to welfare recipients (*Id.*, 27). No definable standards of suitability exist (*Id.*, 28). No job training is available to persons offered work rule jobs (*Id.* 29). The ineligibility which flows from refusal to accept a job is considered "rather permanent." However, if one reapplies for benefits, the question of need is reexamined, and in practice aid will be granted if the job is not still available (*Id.*, 46-47).

The three Calloway plaintiffs, sisters, were offered the same job in the course of a single telephone call (Carson depos., 82). This was also a babysitting job, an opening for

one person, involving caring for two small children at a home some fifteen to twenty miles distant from the Calloway plaintiffs' residence (Carson depos., 82). When they each in turn declined the offer, on April 8, 1970, their cases were submitted to the welfare board; aid was terminated at the April 17th welfare board meeting. On May 12th, when the Calloways came to get food assistance from the welfare office, their AFDC cases were reopened after a telephone inquiry disclosed that the job was no longer open.

The local welfare office was aware from earlier unrelated contacts with the prospective employer of his general home situation. The procedure to determine the suitability of the employment was extremely informal in other respects as well:

> Q. Is an accepted procedure in your office to offer jobs over the telephone?
>
> A. No, we do not generally do it this way. The man had to have someone that day or was trying to find someone that day. We knew something about his home situation, and we knew the Calloway girls, and we felt that this was a job that one of them could do because one of them had said when she worked the other two would take care of her children. And this was the plan for each one; if one wouldn't go then we tried the others.
>
> Q. To your knowledge was any counseling given to any of the Calloway girls after the Board made the determination to cut them off?
>
> A. Why type of counseling do you refer to?
>
> Q. Counseling of the type referred to in the WIN manual, as to when someone refuses referral into the WIN program?

A. No, there was no counseling of this type given.

The 1967 amendments to the Social Security Act included the Work Incentive Program for AFDC recipients. The bill reported out by the House, like that which became law, established certain mandatory components of state AFDC plans. Prior efforts in the field of welfare-related work and training programs had been optional with the states. 42 U.S.C. §§ 607, 609.

The proposals sprang from a concern to curb the mounting numbers of AFDC recipients by assisting poverty-level families to economic independence, thereby reducing the federal financial participation in the program. H.R. Rep. No. 544, 90th Cong., 1st Sess. 95-96 (1967). The House Committee noted that the goal of developing the full employment capacities of AFDC recipients could not easily be achieved, given the handicaps under which most such persons suffered:

> Your committee is well aware that this potential can be realized only with careful planning and with the development of appropriate training, educational, child care, and related resources on the part of the State and local welfare agency. *Id.*, 97.

The Senate committee substantially revised the House Bill; the principal change was to bring the administration of the Work Incentive Program under the Department of Labor and state employment commissions. Sen. Rep. No. 318, 90th Cong. 1st Sess. 19-20 (1967); Sen. Rep. No. 744, 90th Cong. 1st Sess., reprinted at 2 U.S. Code Cong. & Admin. News, 90th Cong. 1st Sess. 2834 (1967). In addition, the Senate bill incorporated specific guidelines establishing those persons who would not be considered appro-

priate for referral for participation in the training and employment program. Sen. Rep. No. 744, *supra,* 2984.

The purpose of the legislation which emerged is set forth in the statute:

> The purpose of this part is to require the establishment of a program utilizing all available manpower services, including those authorized under other provisions of law, under which individuals receiving aid to families with dependent children will be furnished incentives, opportunities, and necessary services in order for (1) the employment of such individuals in the regular economy, (2) the training of such individuals for work in the regular economy, and (3) the participation of such individuals in special work projects, thus restoring the families of such individuals to independence and useful roles in their communities. It is expected that the individuals participating in the program established under this part will acquire a sense of dignity, self-worth, and confidence which will flow from being recognized as a wage-earning member of society and that the example of a working adult in these families will have beneficial effects on the children in such families. 42 U.S.C. § 630.

The "incentives, opportunities, and necessary services" are set forth in considerable detail in the statute and regulations authorized thereunder. Entry into the program itself is governed by the state agency in charge of administering AFDC assistance; the state plan must include a referral procedure because the WIN program as a whole is not optional. Under 42 U.S.C. § 602(a)(19) each "appropriate" AFDC recipient, each "appropriate" person whose needs are taken into account under the "essential person"

provision, § 602(a)(7), and each volunteer for the program, must be referred promptly to the representative of the Secretary of Labor.[2] The order in which determinations of appropriateness are made is set out in regulations as well.[3]

For each individual referred to the WIN program, a program of testing and counseling is required in order to determine the person's suitability for a program leading to employment in the regular sector. 42 U.S.C. § 633(a).[4]

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[2] As noted, statutory exceptions have been made. Thus one "so remote from any of the projects under the work incentive programs . . . that he cannot effectively participate," 42 U.S.C. § 602(a)(19)(A)(v), or whose "presence in the home on a substantially continuous basis is required because of the illness or incapacity of another member of the household," 42 U.S.C. § 602(a)(19)(A)(vii), is not to be referred unless he volunteers. In addition, by regulation one whose "presence in the home is required because adequate child-care services cannot be furnished," 45 C.F.R. § 220.35(a)(2)(v), is exempt from mandatory referral.

[3] Determinations as to whether individuals shall be referred under sub-paragraph (1)(i) and (ii) of this paragraph (a) for participation under a Work Incentive Program, will be made in the following order of priority:

(i)(a) Unemployed fathers currently participating in a Work Experience and Training Program under Title V of the Economic Opportunity Act or who have participated in a Community Work and Training Program under section 409 of the Social Security Act; (b) Other unemployed fathers. (ii) Mothers and other caretaker relatives and essential persons who volunteer and are currently participating in a Title V Work Experience and Training Program or have participated in a Community Work and Training Program. (iii) Dependent children and essential persons age 16 or over who are not in school, at work, or in training, and for whom there are no educational plans under consideration for implementation within the next 3 months; (iv) Mothers and others who volunteer but are not currently involved in a Work Experience and Training program and who have no preschool children; (v) Mothers and others who volunteer and have preschool children; (vi) Any others determined by the State to be appropriate for referral. 45 C.F.R. § 220.35(a)(3).

[4] In addition, for each "suitable" person referred to the manpower agency an employability plan describing the particular training required in order to enable that person to become self-supporting is to be developed. 42 U.S.C. § 633(b).

Geared to the WIN program are the statutory requirements of family services and an employment program for each AFDC beneficiary, also added by the 1967 amendments, 42 U.S.C. §§ 602(a)(14), (15), 606(d), 625. In particular the employability program must assure that those referred to the WIN program be afforded child-care services, 42 U.S.C. § 602(a)(15)(B)(i).[5]

Because the WIN program has coercive elements, extensive statutory safeguards have been provided. The welfare agency's decision that a recipient is appropriate for referral to the program is subject to examination in a fair hearing. 42 U.S.C. § 602(a)(4), 45 C.F.R. § 220.35(a)(15), Department of Health, Education and Welfare, Social and Rehabilitation Service, Guidelines for the Work Incentive Program (hereinafter HEW WIN Guidelines) § 42.

A second hearing may occur after referral; the issue here is whether the individual refused without good cause to participate in a WIN program or to accept a bona fide employment offer. This hearing is conducted by the representative

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[5] Both HEW and the Department of Labor have published extensive manuals of guidelines governing the incidents of the Work Incentive Program. The Labor manual, published by the agency in charge of enrolling and training AFDC recipients, sets out in great detail the WIN program standards concerning enrollment, compensation, relocation, refusals to participate, job training hours, safety standards, and so forth; and describes the program operations, encompassing orientation, employability plans, testing, work and training components, job placement, and follow-up services. Department of Labor, Manpower Administration, Work Incentive Program Handbook, Sections 4, 5. An exhaustive account of these standards is not necessary. The reader should be aware, however, that formal rules govern nearly every aspect of the welfare recipient's relation to the program and that it is an elaborate program, consistent with the difficulty of the task undertaken. "[B]ecause it is implicit in the Social Security Act that WIN is to raise people above the poverty level, it is *not* the intent of the program to refer enrollees to low-paying jobs." *Id.*, § 516 (italics original).

of the Secretary of Labor. 42 U.S.C. § 633(g), 45 C.F.R. § 220.35(a)(16). Department of Labor, Manpower Administration, Work Incentive Program Handbook (hereinafter Labor WIN Handbook) § 412(H)-(K).

The statute provides specifically the sanctions which apply to those who are determined by the Secretary of Labor pursuant to § 633(g) to have refused without good cause to participate in a work incentive program or to accept an employment offer after referral. Sanctions apply only to those who are involuntarily referred. § 602(a)(19)(F), 45 C.F.R. § 220.35(a)(6)(ii). If good cause for refusal is lacking, the AFDC grant of the individual child or recipient who made such refusal terminates. 42 U.S.C. § 602(a)(19)(F)(i)-(iv). The cut in aid does not take place, however, for a period of 60 days, if during that time the individual accepts counseling designed to encourage him to resume participation, 42 U.S.C. § 602(a)(19)(F), 45 C.F.R. § 220.35(a)(8).

The legislation leaves substantial latitude to the states in determining who is "appropriate" for mandatory referral to the Work Incentive Program. By regulation, those subject to mandatory referral include, briefly, unemployed fathers (when included in the state's plan, which is not the case in Virginia) and dependent children over age 16 and not employed or attending school. 45 C.F.R. § 220.35(a)(1)(iv), HEW WIN Guidelines § 41.1. Others may be included within the mandatory category at the state's option. The Virginia WIN regulations list as "appropriate" persons, dependent youths, as required, and "mothers and other caretaker relatives who are not currently participating in a work or training program," Virginia Department of Welfare and Institutions, Manual of Procedure, Work Incentive Program (hereinafter DWI WIN Manual), § 201A.

Referral is to be prompt, *Id.*, § 204, as the statute and regulations require, 42 U.S.C. § 602(a)(19)(A), 45 C.F.R. § 220.35(a)(1)(iii), and is not to be postponed by reason of the lack of an existing WIN project to which the appropriate person can be assigned. 45 C.F.R. § 220.35 (a)(1)(iii). These provisions apply to voluntary as well as to compulsory referrals.

Virginia's criteria of appropriateness for compulsory referral excluded from participation in the WIN program "a person living in such an isolated area, without transportation, that it would be infeasible for him to participate in the WIN program," DWI WIN Manual, § 203.1B. It should be kept in mind that regulations concerning appropriateness for the program relate only to compulsory referrals. Volunteers for WIN are to be referred despite a determination of inappropriateness unless the local welfare department finds that enrollment in the program would adversely affect child development and family cohesiveness, DWI WIN Manual, § 203.2. This is in accordance with federal law, 42 U.S.C. 602(a)(19)(A)(iii).

Requirements that persons receiving public assistance accept available employment have historically been a part of welfare programs.[6] The Department of Health, Education and Welfare, while cautioning against the possible adverse consequences to family life of provisions requiring recipients of aid to families with dependent children to accept suitable jobs, has not ruled that they are in conflict with the Social Security Act. Department of Health, Edu-

[6] See Note, Compulsory Work for Welfare Recipients Under the Social Security Amendments of 1967, 4 Colum. J. L. & Soc. Prob. 197, 203-06 (1968); Graham, Public Assistance: Congress and the Employable Mother, 3 U. Richmond L. Rev. 223, 230 (1969); Note, Public Welfare "WIN" Program: Arm-Twisting Incentives, 117 U. Pa. L. Rev. 1062, 1067 n. 43 (1969).

cation and Welfare, Handbook of Public Assistance Administration, pt. IV, § 3401.1.[7]

The 1967 Social Security amendments manifested a turnabout in federal attitudes toward employment programs in the AFDC context. Graham, Public Assistance: Congress and the Employable Mother, supra, n. 6, 228. The involvement in compulsory work programs at once became extensive; by federal statute and regulation numerous incidents of the recipient's relation to the agencies which channel him into employment are governed. The thrust of the congressional approach—comprehensive regulation of the relation between the state and the beneficiary, a full range of programs designed to be of substantial permanent benefit to the individual, specificity as to those activities which the recipient must undertake lest sanctions be imposed, and limitation of sanctions to particular classes of recipients—is inconsistent with the continued application, as in these cases, of a state work rule which attempts to relieve the burden of welfare costs and place the recipient in employment in an imprecise and summary fashion.

In so ruling, the Court emphasizes what questions are not being decided. The Court is not ruling that persons receiving assistance are without obligation to accept employment. Indeed the instant holding is based upon the compulsory work and training provisions in the federal legislation.

Moreover, this decision in no respect imposes new restrictions on the states' power to designate those who shall be deemed appropriate for compulsory referral to WIN. Beyond mandatory inclusions specified by regulation, the

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[7] See Note, Welfare's "Condition X," 76 Y.L.J. 1222, 1230-31 (1967); Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 88-89 (1967).

states appear to be free to classify as appropriate any groups included within the language of § 602(a)(19)(A)(i),(ii) and not excluded by § 602(a)(19)(A)(iv)-(vii).

Furthermore, the ruling is made in the light of statements at bar made by defense counsel, statements which are at least partially supported by the conclusions of the amicus brief, to the effect that the Virginia work rule is not intended to apply to those found appropriate for WIN or volunteering for it, and referred to that program. This is consistent with the testimony of Virginia's Chief of the Bureau of Assistance and Service Programs (Armstrong depos., 63).

The Court must note, however, that it is far from clear that the four named plaintiffs were found inappropriate for referral prior to the termination of their benefits pursuant to the Virginia work rule. The service worker responsible for considering Vivian Woolfolk's suitability for WIN never concluded that she was inappropriate and in fact never finished her evaluation. (Martin depos., 94). The process was interrupted when the service worker's supervisor informed her that a job possibility had appeared for Miss Woolfolk (*Id.*, 98); nothing further was done after AFDC was cut off (*Id.*, 101). The same service worker testified concerning the Calloway sisters that she was attempting to relocate some or all of them to a residence in Goode so that they would be more accessible to employment or training under WIN at the time the job opportunity arose (*Id.*, 105). She recognized that their remoteness presented a problem, but still contemplated giving a mental examination to further determine suitability (*Id.*, 107). Aid termination ended these efforts. Curiously, the files of the local welfare department for each Calloway sister contain copies of form MA-101, the initial information record

completed after an individual is referred to a manpower agency. United States Department of Labor, Manpower Administration, WIN Information System Manual, § 3.1.2 (1970). The forms indicate that each of the sisters was referred by the welfare agency under category six, "AFDC mothers and others who volunteer and who have no preschool children," *Id.* These forms were dated November 17, 1969. The files further indicate that the welfare department became aware that they had been filled out soon after their completion. Despite that the sisters were considered by the WIN component to be in a "holding" status on April 8, 1970, the work rule was nevertheless applied to each and their grants were terminated.

In any event, the defendants concede, as stated, that § 211.4E and F have no impact on people referred to WIN. This position is correct legally, for Congress certainly cannot have intended that those in WIN programs be subject to precipitous termination of their training activities or preparation for employment whenever the welfare agency located "suitable" employment. Such a frustration of the federal program would occur if the WIN and work rule provisions applied at the same time to the same people. The rights to testing, counseling, and employability plan granted by federal law, and the rights to participate in training programs established under the act would be nullified. Moreover the right to be subjected only to the sanction of denial of benefits attributable to the single individual who declines to participate, after a hearing and review conducted by the manpower agency, would be denied. When a state rule otherwise would nullify rights granted by federal law and stymie the operation of a federal program, it must yield. Cf. *Colorado Anti-Discrimination Commission* v. *Continental Airlines,* 372 U.S. 714 (1963). State legislation

which effectively denies welfare recipients "the very benefaction the [federal] act was intended to bestow," *Shepheard* v. *Godwin,* 280 F. Supp. 869 (E.D. Va. 1968), cedes under the supremacy clause to the federal statute.

The decision that the federal scheme ousted any state power to enforce a regulation governing acceptance of employment against those referred to WIN necessarily leads to the conclusion that those found inappropriate for WIN are also immune from such a rule; for to hold to the contrary would frustrate still another aspect of the federal scheme. The WIN statute and regulations provide that, despite a finding of inappropriateness under the state's standards, a welfare recipient may volunteer for the program, and that such applicants must be promptly referred and enrolled. Referral may be denied a volunteer only on grounds related to the health of the family structure. It is no justification for non-referral, for example, that child care is not currently sufficient or that the individual is too remote from the site of a WIN project in the opinion of welfare officials. Once enrolled, the volunteer is at liberty to withdraw, too, without fear of the sanctions which apply to compulsorily referred persons.

If the defendants' position, that the Virginia work rule does not cover WIN participants but that it may nonetheless be applied to those found inappropriate by the local welfare departments, were accepted, an illogical situation would exist; for it must nonetheless be a simple matter for an AFDC recipient to avoid the impact of the state rule. Those found inappropriate could simply request referral to WIN in order to obtain the benefits of the protection, congressionally created, from the sanction of termination of aid. If the statutory plan to define and limit the sanctions applicable to those involuntarily referred as "appropriate"

for WIN bars imposing overlapping state requirements with broader sanctions, it is inconceivable that such a state rule might apply to persons whom Congress decided should be subject to no penalties at all.

Legislative history coincides with this conclusion. The Senate Finance Committee report envisioned no compulsory work or training for those required, under the statute, to be found inappropriate.

> To provide guidelines and to clarify the manner in which the program will operate, the committee bill sets forth a number of categories of individuals who would not be considered as "appropriate" for referral to the Secretary of Labor for the work incentive program. Persons described in those categories would not be placed in any work situation unless they chose to request employment or training. Sen. Rep. No. 744, *supra*, 2984.

This conclusion is consistent as well with the tenor of the floor discussions of the legislation in the Senate. Senator Long introduced and explained the bill, which at the time included a provision describing as exempt from referral those whose participation the state found would not be in their interest or that of the program. This latter proviso was later deleted as redundant, apparently because the state could establish the definition of those appropriate in any event. Senator Long interpreted the language defining appropriate persons as follows:

> The Senate committee feels work should not be required as a condition of drawing welfare payments as to certain people. We spell out those people we think should not be required to go to work. We say to the

> states, "If you want to, go ahead and put some other provisions in here with respect to people whom you do not think should be required to go to work." . . . Thus, having challenged the imagination of the states as well as that of the committee, we ask the question, "Can you tell if there is any other sufficient reason why an individual should not do something and help society as a condition to receiving welfare money?" 113 Cong. Rec. 32593 (1967).

He stressed as well the provision guarantying protective and vendor payments for the benefit of dependent children whose parents refuse employment, grants which the Senate bill included "to protect dependent children from the faults of others," *Id.*, 32593. Senator Ribicoff remarked immediately thereafter that "The Senate bill wisely identifies certain groups of people who ought not to be considered in the pool of those automatically considered appropriate for training or work experience," *Id.*, 32852.

Extensive floor discussion concerning an amendment offered by the late Senator Kennedy of New York reflected the legislators' conception of a statutory exemption from compulsory referral to WIN, *Id.*, 33540-45. The amendment would have exempted most mothers of school age children. The discussion of its impact, even allowing for the imprecision of spoken words, discloses that both proponents and opponents of the measure conceived of the legislation which became 42 U.S.C. § 602(a)(19)(A)(iv)-(vii) as setting down exemptions from any mandatory employment or job training in exchange for AFDC benefits. Senator Kennedy spoke of the bill and his own proposal:

> As the legislation reads at the present time, we have accepted the idea that a mother with preschool children

> should remain at home and that the mother should not be forced to work under those conditions . . .
>
> My amendment accepts the idea that while children are in school, the mother can work during that period of time; but when the children are out of school, or on vacation, or during the summer, the mother, it seems to me, should remain at home to take care of the children. *Id.*, 33541.

Senator Long opposed the alteration, arguing, among other points, that the bill which he supported would demand that whenever work was required child care would be provided, and that the child's share of the welfare allotment would be paid even if the employment were rejected. *Id.*, 33542. Only on these terms, with WIN benefits and limited sanctions, would a work requirement be enforced. Moreover, Senator Long argued, the states were free to exempt whomever they wished, including mothers of school age children. He continued:

> However, I cannot support an amendment that would provide that a State could not have an effective work program, even if it wanted to.
>
> We are urged to fix it up by Federal fiat so that even if a State wanted to have an effective work program, it could not have it . . . . *Id.*, 33543.
>
> Under the Senator's amendment, if the State of Maine wanted to set up a program to look after that child from 6 in the morning until 6 in the evening, with all the elaborate care and professional Hollywood help that can be recruited to show them a good time, under the Senator' amendment, we could not ask [the mother] to go to work or forfeit her welfare check . . . .*Id.*, 33544.

> Mr. President, I should like to make this clear. Under this provision, we say, by Federal law, that a State shall not require any mother to go to work as a condition of receiving welfare payments for both herself and her child.
>
> We were unanimous about this. We set down every logical reason that occurred to us why a mother should not be expected to do anything but help herself and the child. We go further and say that when the State wants to find some additional reason why it is not in the interest of the child for the mother to go to work, the State can do so.
>
> If the government of New York feels this way, it will negate the program, anyway, and New York will not have an effective work program. But under the proposal of the Senator from New York, New York could not have an effective work program, even if the legislature and the Governor wanted it to have one. *Id.*, 33545.

Proponents as well as opponents ascribed such an effect to the bill and the proposed amendment. See the remarks of Senator Javits, *Id.*, 33543, and of Senator Muskie, *Id.*, 33543-44.

Subsequent discussion of the bill after it emerged from conference also reflected the legislative consensus that the statutory class of persons not mandatorily referrable constituted a group of recipients who were not subject to termination of benefits for failure to accept work or training. See the remarks of Senator Young, *Id.*, 36775; of Senator McCarthy, *Id.*, 36775-76; of Senator Case, *Id.*, 36794; of Senator Javits, *Id.*, 36796; and of Senator Robert Kennedy, *Id.*, 36784-85. The latter senator, criticizing the mandatory

work legislation, adverted to the "employable mother" eligibility rules applied by some states under existing law: "This rule is being challenged in litigation," he said, "but the provisions of the conference bill on compulsory work and training imply that from now on the 'employable mother' rule would be sanctioned by a national policy." *Id.*, 36788.

In reply to critics of the compulsory work provisions, Senator Smathers pointed out expressly that such requirements have long been included in state welfare plans, and the idea itself was no innovation, but that under the proposed legislation such state regulations could not conflict with the WIN provisions:

> What the opponents of the provisions in that bill do not realize is that the States are now allowed to cut off a family's welfare payment if a parent refuses to work or refuses to take training. And, many states are doing just that. For example, in New York State when a father refuses work without good cause they cut off aid to the whole family. And New York does that every day. Under the bill, New York State will have to continue aid to the children in such cases. For the first time there will be restrictions on the states. How can anyone characterize such a provision as regressive? *Id.*, 36912.

The Congressional conception of this aspect of the act passed is therefore quite clear, at least in comparison with the provisions interpreted, for instance, in *Rosado* v. *Wyman, supra.* The legislators debated and decided upon certain federal rules establishing certain groups as not subject to referral for compulsory work or training not so much on the basis of the likelihood that such persons would not be suitable for training in the programs created by federal legislation or would not benefit therefrom, but on the basis

that such persons ought not to be removed from the home situation for any purposes. Classification as inappropriate for referral to WIN, moreover, was conceived as conferring an exemption from any requirement that a person assume employment responsibilities or accept training in return for AFDC.

This conception is reflected in the statute which emerged. It would make little sense for Congress so extensively to describe the class of persons subject to sanctions for refusal to accept training or employment (which employment, of course, includes job opportunities in the private sector) and to define in detail the sanctions available, if the legislation might be nullified by state rules exposing additional persons to compulsory employment and imposing additional sanctions on recipients for failure to accept work. The Court concludes therefore that, as applied to AFDC recipients and persons whose needs are taken into account in determining overall needs, who are residents of areas where the work incentive program is in effect, the Virginia work rule is invalid for inconsistency with federal law.

A question remains whether there are some individuals in the plaintiff class to whom the state work rule may be applied by reason of the limited development of the Work Incentive Program. The statute directs the Secretary of Labor to establish WIN programs

> . . . in each State and in each political subdivision of a State in which he determines there is a significant number of individuals who have attained age 16 and are receiving aid to families with dependent children. In other political subdivisions, he shall use his best efforts to provide such programs either within such subdivisions or through the provision of transportation for such persons to political subdivisions of the State

in which such programs are established. 42 U.S.C. § 632(a).

Section 632(b) requires that all such programs include three elements—employment, training, and special work projects.

The Department of Labor criteria, apparently defining the statutory "significant number," classify any county with at least 1100 AFDC and AFDC-Unemployed Fathers recipients eligible for referral to be "eligible to operate a WIN program within its boundaries." Labor WIN Handbook § 403(B)(2). Where under 1100 reside in the county, the area "may operate a local program at the discretion of the Secretary of Labor under the 'best efforts' clause," Labor WIN Handbook § 403(B)(3). Pertinent in determining whether a program should operate in the latter type of area is the area's "proximity to existing WIN programs," *Id.*, presumably a factor in considering whether to transport WIN participants to a program in another political subdivision as an alternative to the creation of a second program in their home area.

Principally from these statutory geographic limitations, it is apparent that the WIN program is, as the Government's brief says, not all-inclusive, in that Congress envisioned that there would be some counties within which no functioning WIN program would be placed. Still the question is whether the work rule and its sanctions are therefore enforceable against some or all residents of such areas.

Legislative history discloses an exception that, in view of the mandtory and "best efforts" requirements to commence local programs, together with the provision of transportation, WIN programs would be available for nearly all who were referred. Sen. Rep. No. 744, *supra*, 2984-85.

Despite that § 632 contemplates that WIN programs will exist in fewer than all political subdivisions, the statutes governing participation do not appear to make any blanket exemption from mandatory referral for residents of areas where WIN is not operating. Instead the law says that an individual shall not be mandatorily referred if he is

> so remote from any of the projects under the work incentive programs . . . that he cannot effectively participate under any of such programs. 42 U.S.C. § 602 (a)(19)(A)(v).

This language seems to require a specific, individual finding by the welfare authorities that a given individual is inappropriate by reason of his location rather than the application of a general rule covering all in a certain area. Indeed the provision would seem to allow a finding that a resident of an area containnig a WIN program was nonetheless too distant from it for mandatory referral, and it would be bivalent; one speaks both in terms of "[w]here there is a for other than case-by-case consideration, in another context.

Regulations implementing the WIN legislation also contemplate referral by the welfare agency of persons residing outside the political subdivision where the program operates. Multi-county projects are allowed, Labor WIN Manual, § 300(B)(3). In discussing the "remoteness" exemption from referral, the Labor guidelines state explicitly that "where necessary, arrangements can be made for a person to participate in a project in another county or another state," Labor WIN Manual, § 405(B)(2). The HEW regulations likewise call on the local welfare agencies, before classifying a recipient as inappropriate for remoteness, to call upon its "knowledge of the locations of the various

projects under the State's Work Incentive Program." HEW WIN Guidelines § 41.3(b).

In sum, both administrative agencies construe the statute, in some of their regulations at least, to allow referrals across county lines unless the program site is too remote from the participant's home. This is not to say that there are no regulations inconsistent with such a rule. See, e.g., 45 C.F.R. § 220.35(a)(1)(iii), defining referral to WIN as the transmission of notice of a finding of appropriateness "in an area where a Work Incentive Program is operated," *Id.;* see also, HEW WIN Guidelines §§ 41.1, 61.1, 91. The statute, by contrast, requires the referral of "each appropriate child and relative" over age 16 and receiving AFDC, 42 U.S.C. § 602(a)(19)(A)(i). Other regulations are ambivalent; one speakst both in terms of "[w]here there is a Work Incentive Program," and "those locations where there is *no access* to a Work Incentive Program," HEW WIN Guidelines § 62 (emphasis supplied). Additionally, both Labor and HEW contemplate referral of unemployed fathers to state employment service offices rather than WIN programs in certain instances, HEW WIN Guidelines § 62, Labor WIN Manual § 405(C), despite the direction of 42 U.S.C. § 607.[8] But see 45 C.F.R. § 233.100(a)(6), requiring referral to WIN.

The interpretation of the statute by those in charge of its administration is thus somewhat ambivalent. Agency interpretations cannot override the congressional purpose of course, *King* v. *Smith,* 392 U.S. 309, 333 n. 34 (1968), but

[8] Where the unemployed father provisions are adopted, the state plan must provide:

> "for such assurances as will satisfy the Secretary that fathers of dependent children as defined in subsection (a) of this section will be referred to the Secretary of Labor as provided in section 602(a)(19) of this title within thirty days after receipt of aid with respect to such children." 42 U.S.C. § 607(b)(2)(A).

they often afford a court valuable guidance because they constitute views formed, presumably, by officials duty bound to explore the effect of their construction on the entire statutory plan. Here the administrative rulings offer no real help, nor has the Government's amicus curiae brief taken a firm position. The Court must construe the law on the basis of the congressional purpose discernible from the statute and legislative history.

Plainly § 632(a), in directing the Secretary of Labor to use his best efforts to transport appropriate persons to WIN programs outside their area of residence, signifies that persons not within so-called WIN areas are to be considered for referral to the program. Section 602(a)(19)(A) directs the referral of each appropriate AFDC beneficiary and makes an exception for cases where the state welfare agency determines that a person is in fact located too far from a program to take part. The Senate Report, perhaps overly optimistically, expressed the hope that such a scheme would make WIN availaible to most recipients. The only sensible construction of the legislative plan is that, wherever situated, all AFDC beneficiaries have a right to be considered for referral to WIN and to be found either appropriate or inappropriate by the local welfare agency.

The House Report as well envisions a comprehensive training program, required by statute to be made available to most AFDC recipients, and foresees the review of each recipient's case to determine whether he should participate:

> The objective is to have the program available in all the localities with enough recipients to make the project feasible. It may be possible for the State to arrange for smaller communities to be joined so that the appropriate size group will be available . . . .

> Your committee intends that a *proper evaluation be made of the situation of all mothers* to ascertain the extent to which appropriate child care arrangements should be made available so the mother can go to work....
>
> Children over the age of 16 are expected to be participants in the program if they are not in school and it is otherwise found appropriate, under standards of the Secretary, that they receive this kind of experience. *All adults in AFDC families, and children, as described above are expected to be considered for participation in* this program. H.R. Rep. No. 544, *supra,* 104-105 (emphasis supplied.)

The express legislative intent, then, is that consideration of the appropriateness of a particular person for referral will not be barred on the ground of his location; rather location is one of the factors which the welfare agency weighs in determining appropriateness.

When the WIN program has been developed more slowly than the legislators hoped, or the project locations are unwisely chosen, large numbers of AFDC recipients would be inappropriate for remoteness, and should be so found. Consistent with the congressional intention revealed in the legislative history discussed above, such persons are not to be forced, under the threat of sanctions at variance with those imposed for failure to participate in WIN, to enter employment or work training programs. Congress has endorsed the use of the threat of termination of subsistence level support as a means of forcing the acceptance of training or employment only when the job or the training meets specific federal requirements. State rules seeking roughly similar ends but differing sharply in means cannot co-exist.

This interpretation is buttressed by Congress' provision of the opportunity to volunteer for participation in WIN for persons found, for one reason or another, inappropriate for mandatory referral. The only ground on which their participation may be denied is that referral would be "inimical to the welfare of such person or the family," 42 U.S.C. § 602(a)(10)(A)(iii); see Sen. Rep. No. 744, *supra*, 2984. The right of access to WIN for these persons carries with it the right to immunity from the sanctions of § 602(a)(19)(F). This is a substantial right. Congress, having determined that such persons were not to be forced to participate in WIN by the federal statutory sanction, scarcely can be considered to have intended to permit parallel state sanctions to operate against volunteers. Much less can Congress be taken to have permitted the use of a state work rule to compel inappropriate persons to volunteer for WIN. The operation of the work rule against persons, wherever situated, to be considered for WIN participation is illegal.

Some other legislative scheme might better have further reduced the ranks of government dependents, or been more economical, or actually benefited more recipients. But is it not for this Court or for Virginia to rewrite the federal legislation. We must deal with finished legislative products and apply them to the facts. If the outcome is not what Congress still desires, Congress may withdraw its mandate. The Court merely notes that to the extent that the achievements anticipated in the committee reports have not been forthcoming and the passage of AFDC beneficiaries to self-supporting status has been frustrated by the unavailability of sanctions such as Virginia has attempted to apply, such result is at least partially attributable to the limited development of the WIN programs to date.

The complaint alleges faults as well in the state's fair hearing procedures. Although the evidence disclosed what

may well have been practices inconsistent with *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), the plaintiffs have not pursued this issue. Recent federal regulations require the continuation of aid during appeal, 45 C.F.R. § 205.10, and Virginia has followed suit, Bulletin No. 513, Virginia Manual of Policy and Procedure for Local Welfare Departments, July 24, 1970. The result of this decision is that the provisions of Virginia's work rule, to the extent that it allows termination of aid for noncompliance with its terms, may not be applied; a fortiori it cannot be applied to cut off funds before a fair hearing. For all purposes, too, the state now requires continuation of assistance during review. The issue is either resolved by other relief granted herein or rendered moot, and declaratory and injunctive relief will therefore be denied.

Orders shall enter consistent with this opinion.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: April 22, 1971

APPENDIX II

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 71-1494

Vivian Woolfolk, individually and on behalf of her minor child, Helen L. Woolfolk, and on behalf of all others similarly situated, by her mother and next friend, Ora Maxine Woolfolk,

Appellee,

versus

Otis L. Brown, individually and as Director of the Department of Welfare and Institutions, State of Virginia; E. W. Gregory, Jr., individually and as Chairman of the Board of Welfare and Institutions, State of Virginia; Mary C. Gray, Victor J. Ashe, S. S. Flythe, Elmer T. Gray, L. H. Irby, Robert P. Trice, H. H. Wheeler, and Ashton C. Jones, Jr., individually and as members of the Board of Welfare and Institutions, State of Virginia; June B. Goode, individually and as Superintendent of Public Welfare of the County of Bedford, Virginia,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.
Robert R. Merhige, Jr., District Judge.

(Argued November 1, 1971. Decided March 7, 1972.)

Before Boreman, Senior Circuit Judge, Russell and Field, Circuit Judges.

Anthony F. Troy, Assistant Attorney General of Virginia, (Andrew P. Miller, Attorney General of Virginia, Theodore J. Markow and William M. Phillips, Assistant Attorneys General of Virginia, and Harry W. Garrett, Jr., Commonwealth's Attorney of Bedford County, on brief) for Appellants, and Dennis Yeager (Douglas D. Broadwater, E. Richard Larson, and Mayer G. Freed; and John M. Levy, Legal Aid Society of Roanoke Valley, on brief) for Appellees.

Per Curiam:

Appellees, recipients of Aid to Families with Dependent Children (AFDC) benefits, seeking relief under 42 U.S.C. § 1983, brought this class action[1] representing parents and their children eligible for such benefits under Virginia's AFDC program and subject to section 221.4(E) and (F)[2] (hereafter "Virginia Work Rule") of the Virginia Manual of Policy and Procedure for Local Welfare Departments (hereinafter "Virginia Welfare Manual"). They sought injunctive and declaratory relief against the enforcement of §§ 221.4(E) and (F), contending that those sections were in violation of the Due Process and Equal Protection

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[1] The original complaint was filed by Vivian Woolfolk; subsequently, the court permitted Rosetta, Gayle, and Bera Calloway to intervene.

[2] In July of 1970, sections 221.4(E) and (F) were superseded by sections 305.4(A) and (B) of the Virginia Welfare Manual; the district court, correctly, we think, found the new sections to be substantially identical to their predecessors except for the incorporation of child care requirements in the later sections.

Clauses of the Fourteenth Amendment and in conflict with the Work Incentive Program provisions of the Social Security Act, 42 U.S.C. §§ 601-609, 630, *et seq.*

A duly constituted three-judge district court heard oral arguments and remanded the case to the single-judge district court, having determined that the controversy basically involved an asserted federal-state statutory conflict rather than claims concerning substantive constitutional provisions. *See Rosado* v. *Wyman*, 397 U.S. 397 (1970); *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965).

The district court enjoined enforcement of §§ 221.4(E) and (F) and the superseding and virtually identical §§ 305.4 (A) and (B) of the Virginia Welfare Manual, declaring those sections invalid as being in conflict with the Social Security Act.[3] We affirm.

I

Since 1935, Virginia has participated in the AFDC program established by the Social Security Act of that year. 49 Stat. 620, as amended, 42 U.S.C. §§ 301-1394. Through this program, states distribute grants[4] for the purposes of (1) "encouraging the care of dependent children in their own homes . . . to help maintain and strengthen family life," and (2) "furnish[ing] assistance and rehabilitation and other services, . . . to needy dependent children and the parents and relatives with whom they are living." 42 U.S.C. § 601. For the family unit to receive aid, the child must satisfy two basic federal requirements. First, it must, though living with a parent or other statutorily specified

[3] The district court did not reach plaintiffs' equal protection and due process claims.

[4] The major part of the cost of these grants is provided by the Federal Government if the state distributes such grants in compliance with standards set out in the Social Security Act.

relative, be needy according to a standard of need established by the state, and second, be deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of one parent. 42 U.S.C. § 606.

The disputed sections constituting the Virginia Work Rule were adopted in May 1967 in order to encourage certain AFDC recipients to work in partial support of themselves. The Virginia Work Rule mandates that those AFDC beneficiaries, deemed able to work, who refuse suitable employment are ineligible for further benefits. In case of such a refusal, the sanction of termination of *all* AFDC benefits, to parent and child alike, is imposed in order to stimulate motivation on the part of the parent to secure employment.

The 1967 amendments to the Social Security Act included provisions constituting the Work Incentive Program (hereafter "WIN") for AFDC recipients. Congress also hoped, through WIN, to curb the number of AFDC families by encouraging certain poverty level AFDC recipients to work and achieve economic independence. Pursuant to the WIN program all "appropriate"[5] persons receiving AFDC aid are referred to the Secretary of Labor for participation in that compulsory employment program. 42 U.S.C. § 602 (a)(19). The Work Incentive Program provides for three types of mandatory work and training: (1) employment in the regular economy; (2) training for work in the regular economy; and, (3) publicly financed special work projects. 42 U.S.C. § 602(a)(4). An individual refusing to work after referral to WIN jeopardizes his own AFDC assistance only; aid to the entire family unit is not terminated.

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[5] Appellants maintain that the Virginia Work Rule applies basically to those individuals deemed "inappropriate" for referral to WIN. However, scrutiny of congressional records reveals that Congress did not intend that "inappropriate" persons should be compelled to work in any way.

II

Appellants have not challenged the district court's ruling as applied to the specific factual circumstances of the named appellees, Vivian Woolfolk and the three Calloway sisters. Consequently, only a brief description of the appellees' involvment in this case is necessary.

Vivian Woolfolk and the intervening Calloway sisters were, prior to the initiation of this litigation, mothers of preschool age children and together with their children were receiving AFDC benefits. Each mother was offered, and turned down, work as a domestic.[6] Thereafter, AFDC aid to each mother *and* her children was terminated under the Virginia Work Rule due to the respective mother's refusal to accept the proffered employment; this action resulted.

III

Appellants contend that the Virginia Work Rule is not in conflict with WIN since it applies to an individual only in the event that the WIN program has proved inapplicable to said individual when: (1) he has been found inappropriate for referral; or, (2) has been referred to WIN but has become ineligible for that program by either rejecting suitable employment or being found by the Secretary of Labor to be not employable or trainable. This court is unpersuaded and we agree with the district court that by adoption of the Work Incentive Program Congress intended to preempt work rules for those in the federally assisted AFDC category since

> The thrust of the congressional approach—comprehensive regulation of the relation between the state and the

[6] It is far from clear that the four named appellees were found inappropriate for referral to WIN prior to the application to their cases of the Virginia Work Rule.

> beneficiary, a full range of programs designed to be of substantial permanent benefit to the individual, specificity as to those activities which the recipient must undertake lest sanctions be imposed, and limitation of sanctions to particular classes of recipents—is inconsistent with the continued application, as in these cases, of a state work rule which attempts to relieve the burden of welfare costs and place the recipient in employment in an imprecise and summary fashion. *Woolfolk* v. *Brown*, 325 F.Supp. 1162 at 1170 (E.D. Va. 1971).

Further, we are persuaded that the district court correctly held, *inter alia*, that the Virginia Work Rule is directly in conflict with the WIN sections of the Social Security Act in that it applies to those deemed inappropriate for referral to WIN and provides, upon refusal of employment by an AFDC beneficiary, for termination of payments to the entire family unit rather than merely to the recipient turning down employment. Accordingly, we affirm on the basis of the district court's opinion. *Woolfolk* v. *Brown*, 325 F. Supp. 1162 (E.D. Va. 1971).

Affirmed.

Order

In accordance with the memorandum of the Court this day filed, it is Adjudged and Ordered that:

1. The individually named plaintiffs herein fairly represent the class of persons eligible to receive assistance under the Virginia program of Aid to Families with Dependent Children, and the case is otherwise a proper class action, pursuant to Fed. R. Civ. P., Rule 23(a), (b) (2), 28 U.S.C.

2. The defendants, their successors, officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them receiving actual notice of this order shall cease to enforce or implement the regulation formerly embodied in § 211.4 E & F of the Virginia Manual of Procedure for Local Welfare Departments, or that currently embodied in § 305.4 A & B thereof, or any regulation substantially similar to those provisions against members of the plaintiff class.

3. The plaintiffs are entitled to a declaratory judgment that the regulations referred to in paragraph 2 are invalid for conflict with provisions of federal statutes.

Let the Clerk send a copy of the memorandum and this order to counsel of record and counsel for amicus curiae.

* * *

APPENDIX III

42 U.S.C. § 602. *State plans for aid and services to needy families with children; contents; approval by Secretary*

(a) A State plan for aid and services to needy families with children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan; (4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness; (5) provide (A) such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary to be necessary for the proper and efficient operation of the plan, and (B) for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community services aids, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in assisting any advisory committees established by the State agency; and (6) provide that the State agency will make such re-

ports, in such form and containing such information, as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to assure the correctness and verification of such reports; (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income; (8) provide that, in making the determination under clause (7), the State agency—

(A) shall with respect to any month disregard—

(i) all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full-time student or part-time student is not a full-time employee attending a school, college, or university, or a course of vocational or technical training designed to fit him for gainful employment, and

(ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month (except that

the provisions of this clause (ii) shall not apply to earned income derived from participation on a project maintained under the programs established by section 632(b) (2) and (3) of this title); and

(B) (i) may, subject to the limitations prescribed by the Secretary, permit all or any portion of the earned or other income to be set aside for future identifiable needs of a dependent child, and (ii) may, before disregarding the amounts referred to in subparagraph (A) and clause (i) of this subparagraph, disregard not more than $5 per month of any income;

except that, with respect to any month, the State agency shall not disregard any earned income (other than income referred to in subparagraph (B)) of—

(C) any one of the persons specified in clause (ii) of subparagraph (A) if such person—

(i) terminated his employment or reduced his earned income without good cause within such period (of not less than 30 days) preceding such month as may be prescribed by the Secretary; or

(ii) refused without good cause, within such period preceding such month as may be prescribed by the Secretary, to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined by the State or local agency administering the State plan, after notification by him, to be a bona fide offer of employment; or

(D) any of such persons specified in clause (ii) of subparagraph (A) if with respect to such month the in-

come of the persons so specified (within the meaning of clause (7)) was in excess of their need as determined by the State agency pursuant to clause (7) (without regard to clause (8)), unless, for any one of the four months preceding such month, the needs of such persons were met by the furnishing of aid under the plan;

(9) provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of aid to families with dependent children; (10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals; (11) effective July 1, 1952, provide for prompt notice to appropriate law-enforcement officials of the furnishing of aid to families with dependent children in respect of a child who has been deserted or abandoned by a parent; (12) provide, effective October 1, 1950, that no aid will be furnished any individual under the plan with respect to any period with respect to which he is receiving old-age assistance under the State plan approved under section 302 of this title; (13) provide a description of the services which the State agency makes available to maintain and strengthen family life for children, including a description of the steps taken to assure, in the provision of such services, maximum utilization of other agencies providing similar or related services; (14) provide for the development and application of a program for such family services, as defined in section 606 (d) of this title, and child-welfare services, as defined in section 625 of this title, for each child and relative who receives aid to families with dependent children, and each appropriate individual (living

in the same home as a relative and child receiving such aid whose needs are taken into account in making the determination under clause (7)), as may be necessary in the light of the particular home conditions and other needs of such child, relative, and individual, in order to assist such child, relative, and individual to attain or retain capability for self-support and care and in order to maintain and strengthen family life and to foster child development; (15) provide—

(A) for the development of a program for each appropriate relative and dependent child receiving aid under the plan, and each appropriate individual (living in the same home as a relative and child receiving such aid) whose needs are taken into account in making the determination under clause (7), with the objective of—

(i) assuring, to the maximum extent possible, that such relative, child, and individual will enter the labor force and accept employment so that they will become self-sufficient, and

(ii) preventing or reducing the incidence of births out of wedlock and otherwise strengthening family life,

(B) for the implementation of such programs by—

(i) assuring that such relative, child, or individual who is referred to the Secretary of Labor pursuant to clause (19) is furnished child-care services and that in all appropriate cases family planning services are offered them, and

(ii) in appropriate cases, providing aid to families with dependent children in the form of payments of the types described in section 606(b)(2) of this title, and

(C) that the acceptance by such child, relative, or individual of family planning services provided under the plan shall be voluntary on the part of such child, relative, or individual and shall not be a prerequisite to eligibility for or the receipt of any other service or aid under the plan.

(D) for such review of each such program as may be necessary (as frequently as may be necessary, but at least once a year) to insure that it is being effectively implemented,

(E) for furnishing the Secretary with such reports as he may specify showing the results of such programs, and

(F) to the extent that such programs under this clause or clause (14) are developed and implemented by services furnished by the staff of the State agency or the local agency administering the State plan in each of the political subdivisions of the State, for the establishment of a single organizational unit in such State or local agency, as the case may be, responsible for the furnishing of such services;

(16) provide that where the State agency has reason to believe that the home in which a relative and child receiving aid reside is unsuitable for the child because of the neglect, abuse, or exploitation of such child it shall bring such condition to the attention of the appropriate court or

law enforcement agencies in the State, providing such data with respect to the situation it may have; (17) provide—

(A) for the development and implementation of a program under which the State agency will undertake—

(i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him, and

(ii) in the case of any child receiving such aid who has been deserted or abandoned by his parent, to secure support for such child from such parent (or from any other person legally liable for such support), utilizing any reciprocal arrangements adopted with other States to obtain or enforce court orders for support, and

(B) for the establishment of a single organizational unit in the State agency or local agency administering the State plan in each political subdivision which will be responsible for the administration of the program referred to in clause (A);

(18) provide for entering into cooperative arrangements with appropriate courts and law enforcement officials (A) to assist the State agency in administering the program referred to in clause (17) (A), including the entering into of financial arrangements with such courts and officials in order to assure optimum results under such program, and (B) with respect to any other matters of common concern to such courts or officials and the State agency or local agency administering the State plan; (19) provide—

(A) for the prompt referral to the Secretary of Labor or his representative for participation under a work incentive program established by part C of—

(i) each appropriate child and relative who has attained age sixteen and is receiving aid to families with dependent children,

(ii) each appropriate individual (living in the same home as a relative and child receiving such aid) who has attained such age and whose needs are taken into account in making the determination under section 602(a)(7) of this title, and

(iii) any other person claiming aid under the plan (not included in clauses (i) and (ii)), who, after being informed of the work incentive programs established by part C, requests such referral unless the State agency determines that participation in any of such programs would be inimical to the welfare of such person or the family;

except that the State agency shall not so refer a child, relative, or individual under clauses (i) and (ii) if such child, relative, or individual is—

(iv) a person with illness, incapacity, or advanced age,

(v) so remote from any of the projects under the work incentive programs established by part C that he cannot effectively participate under any of such programs,

(vi) a child attending school full time, or

(vii) a person whose presence in the home on a substantially continuous basis is required because of

the illness or incapacity of another member of the household;

(B) that aid under the plan will not be denied by reason of such referral or by reason of an individual's participation on a project under the program established by section 632(b) (2) or (3) of this title;

(C) for arrangements to assure that there will be made a non-Federal contribution to the work incentive programs established by part C by appropriate agencies of the State or private organizations of 20 per centum of the cost of such programs, as specified in section 635(b) of this title;

(D) that (i) training incentives authorized under section 634 of this title, and income derived from a special work project under the program established by section 632(b) (3) of this title shall be disregarded in determining the needs of an individual under section 602(a) (7) of this title, and (ii) in determining such individual's needs the additional expenses attributable to his participation in a program established by section 632(b) (2) of (3) of this title shall be taken into account;

(E) that, with respect to any individual referred pursuant to subparagraph (A) who is participating in a special work project under the program established by section 632(b) (3) of this title, (i) the State agency, after proper notification by the Secretary of Labor, will pay to such Secretary (at such times and in such manner as the Secretary of Health, Education, and Welfare prescribes) the money payments such State would otherwise make to or on behalf of such individual (including such money payments with re-

spect to such individual's family), or 80 per centum of such individual's earnings under such program, whichever is lesser and (ii) the State agency will supplement any earnings received by such individual by payments to such individual (which payments shall be considered aid under the plan) to the extent that such payments when added to the individual's earnings from his participation in such special work project will be equal to the amount of the aid that would have been payable by the State agency with respect to such individual's family had he not participated in such special work project, plus 20 per centum of such individual's earnings from such special work project; and

(F) that if and for so long as any child, relative, or individual (referred to the Secretary of Labor pursuant to subparagraph (A) (i) and (ii) and section 607(b) (2) of this title) has been found by the Secretary of Labor under section 633(g) of this title to have refused without good cause to participate under a work incentive program established by part C with respect to which the Secretary of Labor has determined his participation is consistent with the purpose of such part C, or to have refused without good cause to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined, after notification by him, to be a bona-fide offer of employment—

(i) if the relative makes such refusal, such relative's needs shall not be taken into account in making the determination under clause (7), and aid for any dependent child in the family in the form of pay-

ments of the type described in section 606(b) (2) of this title (which in such a case shall be without regard to clauses (A) through (E) thereof) or section 608 of this title will be made;

(ii) aid with respect to a dependent child will be denied if a child who is the only child receiving aid in the family makes such refusal;

(iii) if there is more than one child receiving aid in the family, aid for any such child will be denied (and his needs will not be taken into account in making the determination under clause (7)) if that child makes such refusal; and

(iv) if such individual makes such refusal, such individual's needs shall not be taken into account in making the determination under clause (7);

except that the State agency shall, for a period of sixty days, make payments of the type described in section 606(b) (2) of this title (without regard to clauses (A) through (E) thereof) on behalf of the relative specified in clause (i), or continue aid in the case of a child specified in clause (ii) or (iii), or take the individual's needs into account in the case of an individual specified in clause (iv), but only if during such period such child, relative, or individual accepts counseling or other services (which the State agency shall make available to such child, relative, or individual) aimed at persuading such relative, child, or individual, as the case may be, to participate in such program in accordance with the determination of the Secretary of Labor; (20) effective July 1, 1969, provide for aid to families with dependent children in the form of foster care in accordance with section 608

of this title; (21) provide that the State agency will report to the Secretary, at such times (not less often than once each calendar quarter) and in such manner as the Secretary may prescribe—

(A) the name, and social security account number, if known, of each parent of a dependant child or children with respect to whom aid is being provided under the State plan—

(i) against whom an order for the support and maintenance of such child or children has been issued by a court of competent jurisdiction but who is not making payments in compliance or partial compliance with such order, or against whom a petition for such an order has been filed in a court having jurisdiction to receive such petition, and

(ii) whom it has been unable to locate after requesting and utilizing information included in the files of the Department of Health, Education, and Welfare maintained pursuant to section 405 of this title,

(B) the last known address of such parent and any information it has with respect to the date on which such parent could last be located at such address, and

(C) such other information as the Secretary may specify to assist in carrying out the provisions of section 610 of this title;

(22) provide that the State agency will, in accordance with standards prescribed by the Secretary, cooperate with the State agency administering or supervising the administration of the plan of another State under this part—

(A) in locating a parent residing in such State (whether or not permanently) against whom a petition has been filed in a court of competent jurisdiction of such other State for the support and maintenance of a child or children of such parent with respect to whom aid is being provided under the plan of such other State, and

(B) in securing compliance or good faith partial compliance by a parent residing in such State (whether or not permanently) with an order issued by a court of competent jurisdiction against such parent for the support and maintenance of a child or children of such parent with respect to whom aid is being provided under the plan of such other State;

and (23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

(b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the applica-

tion, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth.

(c) The Secretary shall, on the basis of his review of the reports received from the State under clause (15) of subsection (a) of this section, compile such data as he believes necessary and from time to time publish his findings as to the effectiveness of the programs developed and administered by the States under such clause. The Secretary shall annually report to the Congress (with the first such report being made on or before July 1, 1970) on the programs developed and administered by each State under such clause (15).

Aug. 14, 1935, c. 531, Title IV, § 402, 49 Stat. 627; Aug. 10, 1939, c. 666, Title IV, § 401, 53 Stat. 1379; 1946 Reorg. Plan No. 2, § 4, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Aug. 28, 1950, c. 809, Title III, Pt. 2, § 321, Pt. 6, § 361(c, d), 64 Stat. 549, 558; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. April 11, 1953, 18 F.R. 2053, 67 Stat. 631; Aug. 1, 1956, c. 836, Title III, § 312(b), 70 Stat. 849; July 25, 1962, Pub. L. 87-543, Title I, §§ 103, 104(a) (2), (3) (A), (B), (5) (A), 106(b), 76 Stat. 185, 188; July 30, 1965, Pub. L. 89-97, Title IV, §§ 403(b), 410, 79 Stat. 418, 423; Jan. 2, 1968, Pub. L. 90-248, Title II, §§ 201(a), (b), 202(a), (b), 204 (b), (e), 205(a), 210(a) (2), 211(a), 213(b), 81 Stat. 877, 879, 881, 890, 892, 895, 896, 898.

Part C—Work Incentive Program For Recipients Of Aid Under State Plan Approved Under Part A

42 U.S.C. § 630. *Statement of purpose*

The purpose of this part is to require the establishment of a program utilizing all available manpower services, in-

cluding those authorized under other provisions of law, under which individuals receiving aid to families with dependent children will be furnished incentives, opportunities, and necessary services in order for (1) the employment of such individuals in the regular economy, (2) the training of such individuals for work in the regular economy, and (3) the participation of such individuals in special work projects, thus restoring the families of such individuals to independence and useful roles in their communities. It is expected that the individuals participating in the program established under this part will acquire a sense of dignity, self-worth, and confidence which will flow from being recognized as a wage-earning member of society and that the example of a working adult in these families will have beneficial effects on the children in such families.

Aug. 14, 1935, c. 531, Title IV, § 430, as added Jan. 2, 1968, Pub. L. 90-248, Title II, § 204(a), 81 Stat. 884.

42 U.S.C. § 632. *Establishment of programs*

(a) The Secretary of Labor (hereinafter in this part referred to as the Secretary) shall, in accordance with the provisions of this part, establish work incentive programs (as provided for in subsection (b) of this section) in each State and in each political subdivision of a State in which he determines there is a significant number of individuals who have attained age 16 and are receiving aid to families with dependent children. In other political subdivisions, he shall use his best efforts to provide such programs either within such subdivisions or through the provision of transportation for such persons to political subdivisions of the State in which such programs are established.

(b) Such programs shall include, but shall not be limited to, (1) a program placing as many individuals as is possible in employment, and utilizing on-the-job training positions for others, (2) a program of institutional and work experience training for those individuals for whom such training is likely to lead to regular employment, and (3) a program of special work projects for individuals for whom a job in the regular economy cannot be found.

(c) In carrying out the purposes of this part the Secretary may make grants to, or enter into agreements with, public or private agencies or organizations (including Indian tribes with respect to Indians on a reservation), except that no such grant or agreement shall be made to or with a private employer for profit or with a private nonprofit employer not organized for a public purpose for purposes of the work experience program established by clause (2) of subsection (b) of this section.

(d) Using funds appropriated under this part, the Secretary, in order to carry out the purposes of this part, shall utilize his authority under the Manpower Development and Training Act of 1962, the Act of June 6, 1933, as amended (48 Stat. 113), and other Acts, to the extent such authority is not inconsistent with this chapter.

(e) The Secretary shall take appropriate steps to assure that the present level of manpower services available under the authority of other statutes to recipients of aid to families with dependent children is not reduced as a result of programs under this part.

Aug. 14, 1935, c. 531, Title IV, § 432, as added Jan. 2, 1968, Pub. L. 90-248, Title II, § 204(a), 81 Stat. 884.

42 U.S.C. § 633. *Operation of program*

(a) The Secretary shall provide a program of testing and counseling for all persons referred to him by a State, pursuant to section 602 of this title, and shall select those persons whom he finds suitable for the programs established by clauses (1) and (2) of section 632(b) of this title. Those not so selected shall be deemed suitable for the program established by clause (3) of such section 632(b) of this title unless the Secretary finds that there is good cause for an individual not to participate in such program.

(b) The Secretary shall develop an employability plan for each suitable person referred to him under section 602 of this title which shall describe the education, training, work experience, and orientation which it is determined that each such person needs to complete in order to enable him to become self-supporting.

(c) The Secretary shall make maximum use of services available from other Federal and State agencies and, to the extent not otherwise available on a nonreimbursable basis, he may reimburse such agencies for services rendered to persons under this part.

(d) To the extent practicable and where necessary, work incentive programs established by this part shall include, in addition to the regular counseling, testing, and referral available through the Federal-State Employment Service System, program orientation, basic education, training in communications and employability skills, work experience, institutional training, on-the-job traning, job development, and special job placement and followup services, required to assist participants in securing and retaining employment and securing possibilities for advancement.

(e)(1) In order to develop special work projects under the program established by section 632(b)(3) of this title, the Secretary shall enter into agreements with (A) public agencies, (B) private nonprofit organizations established to serve a public purpose, and (C) Indian tribes with respect to Indians on a reservation, under which individuals deemed suitable for participation in such a program will be provided work which serves a useful public purpose and which would not otherwise be performed by regular employees.

(2) Such agreements shall provide—

(A) for the payment by the Secretary to each employer a portion of the wages to be paid by the employer to the individuals for the work performed;

(B) the hourly wage rate and the number of hours per week individuals will be scheduled to work on special work projects of such employer;

(C) that the Secretary will have such access to the premises of the employer as he finds necessary to determine whether such employer is carrying out his obligations under the agreement and this part; and

(D) that the Secretary may terminate any agreement under this subsection at any time.

(3) The Secretary shall establish one or more accounts in each State with respect to the special work projects established and maintained pursuant to this subsection and place into such accounts the amounts paid to him by the State agency pursuant to section 602(a)(19)(E) of this title. The amounts in such accounts shall be available for the payments specified in subparagraph (A) of paragraph (2). At the end of each fiscal year and for such period of time as he may establish, the Secretary shall determine how much

of the amounts paid to him by the State agency pursuant to section 602(a)(19)(E) of this title were not expended as provided by the preceding sentence of this paragraph and shall return such unexpended amounts to the State, which amounts shall be regarded as overpayments for purposes of section 603(b)(2) of this title.

(4) No wage rates provided under any agreement entered into under this subsection shall be lower than the applicable minimum wage for the particular work concerned.

(f) Before entering into a project under any of the programs established by this part, the Secretary shall have reasonable assurances that—

(1) appropriate standards for the health, safety, and other conditions applicable to the performance of work and training on such project are established and will be maintained,

(2) such project will not result in the displacement of employed workers,

(3) with respect to such project the conditions of work, training, education, and employment are reasonable in the light of such factors as the type of work, geographical region, and proficiency of the participant,

(4) appropriate workmen's compensation protection is provided to all participants.

(g) Where an individual, referred to the Secretary of Labor pursuant to Section 602(a)(19)(A)(i) and (ii) of this title refuses without good cause to accept employment or participate in a project under a program established by this part, the Secretary of Labor shall (after providing opportunity for fair hearing) notify the State agency

which referred such individual and submit such other information as he may have with respect to such refusal.

(h) With respect to individuals who are participants in special work projects under the program established by section 632(b)(3) of this title, the Secretary shall periodically (but at least once every six months) review the employment record of each such individual while on such special work project and on the basis of such record and such other information as he may acquire determine whether it would be feasible to place such individual in regular employment or on any of the projects under the programs established by section 632(b)(1) and (2) of this title.

Aug. 14, 1935, c. 531, Title IV, § 433, as added Jan. 2, 1968, Pub. L. 90-248, Title II, § 204(a) 81 Stat. 885.

* * *

APPENDIX IV

Title IV—Grants To States For Aid And Services To Needy Families With Children And For Child-Welfare Services

Part A—Aid to Families With Dependent Children

Sec. 401. Appropriation

Sec. 402. State Plans for Aid and Services to Needy Families With Children

Sec. 403. Payment to States

Sec. 404. Operation of State Plans

Sec. 405. Use of Payments for Benefit of Child

Sec. 406. Definitions

Sec. 407. Dependent Children of Unemployed Fathers

Sec. 408. Federal Payments for Foster Home Care of Dependent Children

Sec. 409. Community Work and Training Programs

Sec. 410. Assistance by Internal Revenue Service in Locating Parents

Part C—Work Incentive Program for Recipients of Aid Under State Plan Approved Under Part A

Sec. 430. Purpose

Sec. 431. Appropriation

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Sec. 435. Federal Assistance

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Sec. 441. Evaluation and Research

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Sec. 443. Collection of State Share

Sec. 444. Agreements with Other Agencies Providing Assistance to Families of Unemployed Parents

Part A—Aid to Families With Dependent Children

Appropriation

Section 401. For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services as far as practicable under the conditions in such State, to needy dependent children and the parents of relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available

under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education, and Welfare, State plans for aid and services to needy families with children.

State plans for aid and services to needy families with children

Sec. 402. (a) A State plan for aid and services to needy families with children must

* * *

(15) provide—

(A) for the development of a program for each appropriate relative and dependent child receiving aid under the plan, and each appropriate individual (living in the same home as a relative and child receiving such aid) whose needs are taken into account in making the determination under clause (7), * * *

* * * for preventing or reducing the incidence of births out of wedlock and otherwise strengthening family life.

* * * and for implementating such program by assuring that in all appropriate cases family planning services are offered them * * *

* * * but acceptance by such child, relative, or individual of family planning services provided under the plan shall be voluntary on the part of such * * * members and individuals and shall not be a prerequisite to eligibility for or the receipt of any other service * * * under the plan * * *; and

* * * (B) to the extent that * * services provided under this clause or clause (14) are * * furnished by the staff of the State agency or the local agency administering the State plan in each of the political subdivisions of the State, for

the establishing of a single organizational unit in such State or local agency, as the case may be, responsible for the furnishing of such services;

* * *

(19) provide—

* * *

(A) that every individual, as a condition of eligibility for aid under this part, shall register for manpower services, training and employment as provided by regulations of the Secretary of Labor, unless such individual is—

(i) a child who is under age 16 or attending school full time;

(ii) a person who is ill, incapacitated, or of advanced age;

(iii) a person so remote from a work incentive project that his effective participation is precluded;

(iv) a person whose presence in the home is required because of illness or incapacity of another member of the household;

(v) a mother or other relative of a child under the age of six who is caring for the child; or

(vi) the mother or other female caretaker of a child, if the father or another adult male relative is in the home and not excluded by clause (i), (ii), (iii), or (iv) of this subparagraph (unless he has failed to register as required by this subparagraph, or has been found by the Secretary of Labor under section 433(g) to have refused without good cause to participate under a work incentive program or accept employment as described in subparagraph (F) of this paragraph);

and that any individual referred to in clause (v) shall be advised of her option to register if she so desires, pursuant

to this paragraph, and shall be informed of the child care services (if any) which will be available to her in the event she should decide so to register;

(B) that aid under the plan will not be denied by reason of such * * * registration of the individual's certification to the Secretary of Labor under subparagraph (G) of this paragraph, or by reason of an individual's participation on a project under the program established by section 432(b)(2) or (3);

(C) for arrangements to assure that there will be made a non-Federal contribution to the work incentive programs established by part C by appropriate agencies of the State or private organizations of * * * 10 per centum of the cost of such programs, as specified in section 435(b);

(D) that (i) training incentives authorized under section 434, and income derived from a special work project under the program established by section 432(b)(3) shall be disregarded in determining the needs of an individual under section 402(a)(7), and (ii) in determining such individual's needs the additional expenses attributable to his participation in a program established by section 432(b)(2) or (3) shall be taken into account;

* * * and

(F) that if and for so long as any child, relative, or individual (* * * certified to the Secretary of Labor pursuant to subparagraph * * * (G)) has been found by the Secretary of Labor under section 433 (g) to have refused without good cause to participate under a work incentive program established by part C with respect to which the Secretary of Labor has determined his participation is consistent with the purposes of such part C, or to have refused without good cause to accept employment in which he is able to engage

which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined, after notification by him, to be a bona fide offer of employment—

(i) If the relative makes such refusal, such relative's need shall not be taken into account in making the determination under clause (7), and aid for any dependent child in the family in the form of payments of the type described in section 406(b)(2) (which in such a case shall be without regard to clauses (A) through (E) thereof) or section 408 will be made;

(ii) aid with respect to a dependent child will be denied if a child who is the only child receiving aid in the family makes such refusal;

(iii) if there is more than one child receiving aid in the family, aid for any such child will be denied (and his needs will not be taken into account in making the determination under clause (7)) if that child makes such refusal; and

(iv) if such individual makes such refusal, such individual's needs shall not be taken into account in making the determination under clause (7);

except that the State agency shall for a period of sixty days, make payments of the type described in section 406 (b)(2) (without regard to clauses (A) through (E) thereof) on behalf of the relative specified in clause (i), or continue aid in the case of a child specified in clause (ii) or (iii), or take the individual's needs into account in the case of an individual specified in clause (iv), but only if during such period such child, relative, or individual accepts counseling or other services (which the State agency shall make available to such child, relative, or individual) aimed at persuading such relative, child, or individual, as the case

may be, to participate in such program in accordance with the determination of the Secretary of Labor; and

(G) that the State agency will have in effect a special program which (i) will be administered by a separate administrative unit and the employees of which will, to the maximum extent feasible, perform services only in connection with the administration of such program, (ii) will provide (through arrangements with others or otherwise) for individuals who have been registered pursuant to subparagraph (A), in accordance with the order of priority listed in section 433(a), such health, vocational rehabilitation, counseling, child care, and other social and supportive services as are necessary to enable such individuals to accept employment or receive manpower training provided under part C, and will, when arrangements have been made to provide necessary supportive services, including child care, certify to the Secretary of Labor those individuals who are ready for employment or training under part C, (iii) will participate in the development of operational and employability plans under section 433(b); and (iv) provides for purposes of clause (ii), that, when more than one kind of child care is available, the mother may choose the type, but she may not refuse to accept child care services if they are avaliable;

* * *

Payment to states

Sec. 403. (a) From the sums appropriated therefor, the Secretary of the Treasury shall (subject to subsection (d)) pay to each State which has an approved plan for aid and services to needy families with children, for each quarter, beginning with the quarter commencing October 1, 1958—

* * *

(3) in the case of any State, an amount equal to the sum of the following proportions of the total amounts expended during such quarter as found necessary by the Secretary of Health, Education, and Welfare for the proper and efficient administration of the State plan—

(A) 75 per centum of so much of such expenditures as are for—

(i) any of the services described in clauses (14) and (15) of section 402(a) which are provided to any child or relative who is receiving aid under the plan, or to any other individual (living in the same home as such relative and child) whose needs are taken into account in making the determination under clause (7) of such section.

(ii) any of the services described in clauses (14) and (15) of section 402(a) which are provided to any child or relative who is applying for aid to families with dependent children or who, within such periods or periods as the Secretary may prescribe, has been or is likely to become an applicant for or recipient of such aid, or

(iii) the training of personnel employed or preparing for employment by the State agency or by the local agency administering the plan in the political subdivision; plus

(B) one-half of the remainder of such expenditures.

* * *

(c) Notwithstanding any other provision of this Act, the Federal share of assistance payments under this part shall be reduced with respect to any State for any fiscal year after June 30, 1973, by one percentage point for each percentage point by which the number of individuals certified, under the program of such State established pursuant to section 402(a)(19)(G), to the local employment office of

the State as being ready for employment or training under part C, is less than 15 per centum of the average number of individuals in such State who, during such year, are required to be registered pursuant to section 402(c)(19)(A).

(d)(1) Notwithstanding subparagraph (A) of subsection (a)(3) the rate specified in such subparagraph shall be 90 per centum (rather than 75 per centum) with respect to social and supportive services provided pursuant to section 402(a)(19)(G).

(2) Of the sums authorized by section 401 to be appropriated for the fiscal year ending June 30, 1973, not more than $750,000,000 shall be appropriated to the Secretary for payments with respect to services to which paragraph (1) applies.

Part C—Work Incentive Program for Recipients of Aid Under State Plan Approved Under Part A

Purpose

Sec. 430. The purpose of this part is to require the establishment of a program utilizing all available manpower services, including those authorized under other provisions of law, under which individuals receiving aid to families with dependent children will be furnished incentives, opportunities, and necessary services in order for (1) the employment of such individuals in the regular economy, (2) the training of such individuals for work in the regular economy, and (3) the participation of such individuals in * * * public service employment, thus restoring the families of such individuals to independence and useful roles in their communities. It is expected that the individuals participating in the program established under this part will acquire a sense of dignity, self-worth, and confidence which will flow

from being recognized as a wage-earning member of society and that the example of a working adult in these families will have beneficial effects on the children in such families.

Appropriation

Sec. 431. (a) There is hereby authorized to be appropriated to the Secretary of Health, Education, and Welfare for each fiscal year a sum sufficient to carry out the purposes of this part. The Secretary of Health, Education, and Welfare shall transfer to the Secretary of Labor from time to time sufficient amounts, out of the moneys appropriated pursuant to this section, to enable him to carry out such purposes.

(b) Of the amounts expended from funds appropriated pursuant to subsection (a) for any fiscal year (commencing with the fiscal year ending June 30, 1973), not less than 33⅓ per centum thereof shall be expended for carrying out the program of on-the-job training referred to in section 432(b)(1)(B) and for carrying out the program of public service employment referred to in section 482(b)(3).

(c) Of the sums appropriated pursuant to subsection (a) to carry out the provisions of this part for any fiscal year (commencing with the fiscal year ending June 30, 1973), not less than 50 percent shall be allotted among the States in accordance with a formula under which each State receives (from the total available for such allotment) an amount which bears the same ratio to such total as—

(1) In the case of the fiscal year ending June 30, 1973, and the fiscal year ending June 30, 1974, the average number of recipients of aid to families with dependent children in such State during the month of January last preceding the commencement of such fiscal year bears to the average

number of such recipients during such month in all the States; and

(2) In the case of the fiscal year ending June 30, 1975, or in the case of any fiscal year thereafter the average number of individuals in such State who, during the month of January last preceding the commencement of such fiscal year, are registered pursuant to section 402(a)(19)(A) bears to the average number of individuals in all States who, during such month, are so registered.

Establishment of Programs

Sec. 432. (a) The Secretary of Labor (hereinafter in this part referred to as the Secretary) shall, in accordance with the provisions of this part, establish work incentive programs (as provided for in subsection (b) in each State and in each political subdivision of a State in which he determines there is a significant number of individuals who have attained age 16 and are receiving aid to families with dependent children. In other political subdivisions, he shall use his best efforts to provide such programs either within such subdivisions or through the provision of transportation for such persons to political subdivisions of the State in which such programs are established.

(b) Such programs shall include, but shall not be limited to, (1) (A) a program placing as many individuals as is possible in employment, and (B) a program utilizing on-the-job training positions for others, (2) a program of institutional and work experience training for those individuals for whom such training is likely to lead to regular employment, and (3) a program of * * * public service employment for individuals for whom a job in the regular economy cannot be found.

(c) In carrying out the purposes of this part the Secretary may make grants to, or enter into agreements with, public or private agencies or organizations (including Indian tribes with respect to Indians on a reservation), except that no such grant or agreement shall be made to or with a private employer for profit or with a private nonprofit employer not organized for a public purpose for purposes of the work experience program established by clause (2) of subsection (b).

* * *

(d) In providing the manpower training and employment services and opportunities required by this part, the Secretary of Labor shall, to the maximum extent feasible, assure that such services and opportunities are provided by using all authority available to him under this or any other Act. In order to assure that the services and opportunities so required are provided, the Secretary of Labor shall use the funds appropriated to him under this part to provide programs required by this part through such other Act, to the same extent and under the same conditions (except as regards the Federal matching percentage) as if appropriated under such other Act and, in making use of the programs of other Federal, State, or local agencies (public or private), the Secretary of Labor may reimburse such agencies for services rendered to persons under this part to the extent such services and opportunities are not otherwise available on a nonreimbursable basis.

(e) The Secretary shall take appropriate steps to assure that the present level of manpower services available under the authority of other statutes to recipients of aid to families with dependent children is not reduced as a result of programs under this part.

(f)(1) The Secretary of Labor shall establish in each

State, municipality, or other appropriate geographic area with a significant number of persons registered pursuant to section 402(a)(19)(A) a Labor Market Advisory Council the function of which will be to identify and advise the Secretary of the types of jobs available or likely to become available in the area served by the Council: except that if there is already located in any area an appropriate body to perform such function, the Secretary may designate such body as the Labor Market Advisory Council for such area.

(2) Any such Council shall include representatives of industry, labor, and public service employers from the area to be served by the Council.

(3) The Secretary shall not conduct, in any area, institutional training under any program established pursuant to subsection (b) of any type which is not related to jobs of the type which are or are likely to become available in such area as determined by the Secretary after taking into account information provided by the Labor Market Advisory Council for such area.

Operation of Program

Sec. 433. (a) The Secretary shall provide a program of testing and counseling for all persons * * * certified to him by a State, pursuant to section 402(a)(19)(G), and shall select those persons whom he finds suitable for the programs established by clauses (1) and (2) of section 432 (b). Those not so selected shall be deemed suitable for the program established by clause (3) of such section 432 (b) unless the Secretary find that there is good cause for an individual not to participate in such program. The Secretary, in carrying out such program for individuals certified to him under section 402(a)(19)(G), shall accord priority to such individuals in the following order, taking

into account employability potential: first, unemployed fathers; second, mothers, whether or not required to register pursuant to section 402(a)(19)(A), who volunteer for participation under a work incentive program; third, other mothers, and pregnant women, registered pursuant to section 402(a)(19)(A), who are under 10 years of age, fourth, dependent children and relatives who have attained age 16 and who are not in school or engaged in work or manpower training; and fifth, all other individuals so certified to him.

(b)(1) For each State the Secretary shall develop jointly with the administrative unit of such State administering the special program referred to in section 402(a)(19)(G) a statewide operational plan.

(2) The statewide operational plan shall prescribe how the work incentive program established by this part will be operated at the local level, and shall indicate (i) for each area within the State the number and type of positions which will be provided for training, for on-the-job training, and for public service employment, (ii) the manner in which information provided by the Labor Market Advisory Council (established pursuant to section 432(f)) for any such area will be utilized in the operation of such program, and (iii) the particular State agency or administrative unit thereof which will be responsible for each of the various activities and functions to be performed under such program. Any such operational plan for any State must be approved by the Secretary, the administrative unit of such State administering the special program referred to in section 402(a)(19)(G), and the regional joint committee (established pursuant to section 439) for the area in which such State is located.

(3) The Secretary shall develop an employability plan for each suitable person * * * certified to him under section 402(a)(19)(G) which shall describe the education, training, work experience, and orientation which it is determined that * * * such person needs to complete in order to enable him to become self-supporting.

(c) The Secretary shall make maximum use of services available from other Federal and States agencies and, to the extent not otherwise available on a nonreimbursable basis, he may reimburse such agencies for services rendered to persons under this part.

(d) To the extent practicable and where necessary, work incentive programs established by this part shall include, in addition to the regular counseling, testing, and referral available through the Federal-State Employment Service System, program orientation, basic education, training in communications and employability skills, work experience, institutional training, on-the-job training, job development, and special job placement and followup services, required to assist participants in securing and retaining employment and securing possibilities for advancement.

(e)(1) In order to develop * * * public service employment under the program established by section 432(b)(3), the Secretary shall enter into agreements with (A) public agencies, (B) private non-profit organizations established to serve a public purpose, and (C) Indian tribes with respect to Indians on a reservation, under which individuals deemed suitable for participation in such a program will be provided work which serves a useful public purpose and which would not otherwise be performed by regular employees.

(2) Such agreements shall provide—

* * *

(A) for the payment by the Secretary to each employer, with respect to public service employment performed by any individual for such employer, of an amount not exceeding 100 percent of the cost providing such employment to such individual during the first year of such employment, and amount not exceeding 75 percent of the cost of providing such employment to such individual during the second year of such employment, and an amount not exceeding 50 percent of the cost of providing such employment to such individual during the third year of such employment;

(B) the hourly wage rate and the number of hours per week individuals will be scheduled to work * * * in private service employment for such employer;

(C) that the Secretary will have such access to the premises of the employer as he finds necessary to determine whether such employer is carrying out his obligations under the agreement and this part; and

(D) that the Secretary may terminate any agreement under this subsection at any time.

* * *

(4) No wage rates provided under any agreement entered into under the subsection shall be lower than the applicable minimum wage for the particular work concerned.

(f) Before entering into a project under [any of the programs established by this part] section 432(b)(3), the Secretary shall have reasonable assurances that—

(1) appropriate standards for the health, safety, and other conditions applicable to the performance of work and training on such project are established and will be maintained.

(2) such project will not result in the displacement of employed workers.

(3) with respect to such project the conditions of work, training, education, and employment are reasonable in the light of such factors as the type of work, geographical region, and proficiency of the participant.

(4) appropriate workmen's compensation protection is provided to all participants.

(g) Where an individual [referred] certified to the Secretary of Labor pursuant to section 402(a)(19) [A)] (i) and (ii)(g) refuses without good cause to accept employment or participate in a project under a program established by this part, the Secretary of Labor shall (after providing opportunity for fair hearing) notify the State agency which [referred] certified such individual and submit such other information as he may have with respect to such refusal.

(h) With respect to individuals who are participants in [special work projects] public service employment under the program established by section 432 (b)(3), the Secretary shall periodically (but at least once every six months) review the employment record of each such individual while on such special work project and on the basis of such record and such other information as he may acquire determine whether it would be feasible to place such individual in regular employment or on any of the projects under the programs established by section 432(b)(1) and (2).

* * *

APPENDIX V

92d Congress
1st Session

Calendar No. 428

Senate

Report
No. 92-437

The Revenue Act of 1971

November 9, 1971.—Ordered to be printed

Mr. Long, from the Committee on Finance, submitted the following

Report

together with

Additional Views

[To accompany H.R. 10947]

The Committee on Finance, to which was referred the bill (H.R. 10947) to provide a job development investment credit, to reduce individual income taxes, to reduce certain excise taxes, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

I. Summary

As reported by the House, the Revenue Bill of 1971 was designed to provide a balanced program of tax reductions for individuals and tax incentives for business. As

stated in the House report, this bill, in the form passed by the House, was designed to—

* * *

• increase the number of jobs and diminish the high unemployment rate.

* * *

F. Job Development Amendments Related to the Work Incentive Program

(Secs. 701 and 702 of the bill and new sections 40, 50A, and 50B of the code)

The Revenue Act of 1971 is aimed at expanding job opportunities for all Americans. The job development investment credit under title I of the bill is the major instrument for accomplishing this goal. But the committee bill also contains important provisions designed to expand job opportunities for welfare recipients participating in the Work Incentive Program.

The Work Incentive Program was created by the Congress in 1967 as an attempt to cope with the problem of rapidly growing dependency on welfare by providing recipients with the training and job opportunities needed to help them become economically independent. Unfortunately, the results have been disappointing, and few participants in the Work Incentive Program have been placed in employment following completion of participation in the program.

The major single criticism of the Work Incentive Program is that it has not placed welfare recipients in jobs. The reason for this is that well over nniety percent of the enrollees in the program are taking classroom-type courses

rather than employment-based training. Two basic kinds of employment-based training are authorized under present law: on-the-job training with private employers and public service employment in created public jobs. These must be given a much higher priority if welfare recipients are to be employed rather than put into training programs leading nowhere.

The committee bill provides this job-related emphasis. In addition, it establishes a job development tax credit for employment of Work Incentive Program participants which is designed to open up job opportunities for welfare recipients. Other provisions are designed to strengthen the administrative framework of the Work Incentive Program so as to make participants ready for the jobs when the jobs are ready for them.

1. *Job development tax credit for work incentive program*

Employment in the private sector represents our major hope for leading present welfare recipients to economic independence. As an incentive for employers in the private sector to hire individuals placed in on-the-job training or employment through the Work Incentive Program, the committee bill would provide a tax credit equal to 20 percent of the wages and salaries paid to these employees during their first 12 months of employment. The tax credit would be recaptured if the employer terminated the services of the individual during the first 12 months of his employment or before the end of the following 12 months. This recapture provision would not apply if the employee became disabled or left work voluntarily.

The tax incentive is a key provision of the committee bill. The committee recognizes that no work incentive or job training program can ever be successful unless it has the

full cooperation of private business. Many welfare recipients will be very poor employment risks, requiring special training before they can achieve full productivity. It is unrealistic to expect that the business community will undertake this kind of new responsibility without some form of extra financial help in the initial stages. The job development tax incentive is designed to bridge the gap that now exists between the Work Incentive Program and private employment. The committee feels that use of the job development tax credit by employers can only result in savings to taxpayers. There has been virtually no on-the-job training or placement of welfare recipients in private employment under the present program. Any use of the tax credit, therefore, will amount to employment that would in all likelihood not otherwise have taken place. Let us assume that a former welfare recipient is placed in a job paying $5,000 per year. The tax credit amounts to $1,000 *if the former recipient works for two full years.* Welfare payments during those two years in most States would have amounted to more than five times that amount.

Explanation of provision.—Under this job development tax credit, a taxpayer is to be allowed as a credit against his income tax liabiilty for the taxable year an amount equal to 20 percent of "Work Incentive Program expenses" which he has paid or incurred during the year. However, the credit for a taxable year may not exceed $25,000 plus 50 percent of the taxpayer's income tax liability in excess of $25,000. "Work Incentive Program expenses" are defined as the wages and salaries attributable to the first 12 months of employment of employees who are placed in employment under the Work Incentive Program established by the Congress in 1967. The wages paid an employee placed in on-the-job training after participation in the Work Incen-

tive Program would similarly be considered a "Work Incentive Program expense." The amendment makes clear that the credit is not to be available with respect to wages or salaries paid to domestic employees. On the contrary, it is provided that only wages and salaries paid in the course of a trade or business are to qualify.

If the taxpayer without cause terminates the employment of an employee placed under the Work Incentive Program at any time during the first 12 months of employment or at any time during the next 12 months, then the tax credit allowed under this provision with respect to that employee is to be recaptured. In such a case, the tax liability of the taxpayer, for the year of termination, would be increased by an amount equal to previous tax credits allowed for Work Incentive Program expenses incurred with respect to the discharged employee. The recapture provision is not to apply if the employee voluntarily quits or becomes disabled.

This provision also permits any unused tax credits under this section to be carried back three taxable years and then to be carried forward seven taxable years. The unused credit carryback may be used to reduce any income tax liability for the years to which it is carried. However, any unused credit for a year may only be carried back to taxable years beginning after December 31, 1971.

The provision contains several limitations. A credit may not be taken for Work Incentive Program expenses which do not qualify as deductible trade or business expenses, or if the expenses have been reimbursed to the taxpayer. Further, the credit would not be allowed for any expenses of training conducted outside the United States. Also, no work incentive program expenses on behalf of an employee may be used in computing the credit if the expenses are incurred after the end of the 24-month period beginning

with the date of initial employment by the taxpayer. In addition, no Work Incentive Program expenses may be taken into account with respect to an employee who is closely related to the taxpayer. If the taxpayer is a corporation, estate, or trust, special rules are provided to achieve a similar result.

The provision is to be effective for taxable years beginning after December 31, 1971.

2. *Other job development amendments related to the work incentive program*

A number of other amendments are included in the bill to make the Work Incentive Program more employment-oriented, to develop job opportunities for participants in the program and to improve the administrative framework of the program in order to increase its effectiveness in placing participants in jobs. These features are necessary because the Work Incentive Program continues to suffer from the problem of participants finishing their training without jobs being available. At the end of August 1971, for example, about 25,000 participants had completed training; 37 percent of them were in a "holding" category because a job could not be found. The number of persons in this "holding" category has more than doubled in one year, from 4,290 at the end of August 1970 to 9,692 at the end of August 1971.

Linking training and work experience to jobs.—To make training and employment experience under the Work Incentive Program more job-related, the committee bill would require the Labor Department to spend at least 40 percent of the expenditures for the Work Incentive Program for on-the-job training and public service employment. To in-

crease the amount of public service employment, the amendment would simplify the financing and increase the Federal share of the cost of public service employment by providing for 100 percent Federal funding for the first year, and 90 percent Federal sharing of the cost in subsequent years. If the project remained in effect less than 3 years, however, Federal sharing for the first year would be cut back to 90 percent.

Operations under the Work Incentive Program have often failed to meet the objective of the program because too little attention was paid to the actual labor market conditions and requirements in the geographic area. The committee bill would require the establishment of local labor market advisory councils whose function it would be to identify present and future local labor market needs. The findings of this council would serve as the basis for training under the Work Incentive Program at the local level.

Improving administration and coordination.—Under present law, the welfare agency is supposed to prepare an employability plan for each "appropriate" case and make referrals to the Department of Labor, which then is required to prepare an employability plan and place the individual in employment, on-the-job training, institutional training, or public service employment. Problems have arisen in this referral and preparation process.

In some cases, the welfare agency has not referred sufficient numbers of persons, while in other cases they have referred too many persons, without first arranging for such supportive services as child care needed in order for the welfare recipient to participate in the Work Incentive Program. Due to lack of coordination between the welfare agency and the Labor Department, persons have sometimes been referred who do not match the training or employment opportunities available in the area.

The committee bill would solve this problem by requiring the welfare agency to set up a unit with the responsibility of arranging for supportive services so that the welfare recipients may participate in the Work Incentive Program; Federal matching for these supportive services would be raised from 75 percent to 90 percent. The bill would require that the welfare agency and the Labor Department at the local level enter into a joint agreement on an operational plan that is, a plan setting forth the kinds of training that will be arranged for, the kinds of job development the Labor Department will undertake, and the kinds of job opportunities both agencies will have to prepare persons for during the period covered by the plan. In addition, both agencies will jointly develop employability plans for individuals, consistent with the overall operational plan, which will assure that individuals will receive the necessary supportive services and preparation for employment without unnecessary waiting.

The requirement that all "appropriate" persons be referred for work and training has been criticized as difficult to administer with consistency and effectiveness. The committee bill would end the problem by requiring welfare recipients (with certain specified exceptions such as incapacitated persons and mothers of children under age 6) to register with the Secretary of Labor and by establishing clear priority among persons registering for employment and training. The bill would require the Secretary of Labor to accord priority in the following order: (1) unemployed fathers; (2) dependent children and relatives age 16 and over who are not in school, working, or in training; (3) mothers who volunteer for participation; and (4) all other persons.

Other provisions of the bill would mandate coordination between the Departments of Labor and Health, Education,

and Welfare; would increase the Federal matching share for training under the program from 80 percent to 90 percent; would specify an allocation formula for distribution of funds under the Work Incentive Program among the States; and would require on a State-by-State basis that at least 15 percent of the registrants for the Work Incentive Program be enrolled in the program each year.

FILED
SEP 18 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1579

OTIS L. BROWN, et al.,
Petitioners,

vs.

VIVIAN WOOLFOLK, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief of the State of California as Amicus Curiae in Support of the Petition for Certiorari

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1579

OTIS L. BROWN, et al.,
Petitioners,
vs.
VIVIAN WOOLFOLK, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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INTEREST OF AMICUS CURIAE

This amicus curiae brief, which is sponsored by the Attorney General of the State of California, is submitted by the State of California on behalf of the California State Department of Human Resources Development and the California State Department of Social Welfare. The brief is submitted in support of the contention that a substantial federal question is presented by the petition for certiorari.

California, like Virgina and all the other states of the Union, participates in the partially federally funded welfare program entitled Aid for Families with Dependent

Children (AFDC) established by sections 401 et seq. of the Social Security Act (42 U.S.C.A. §§ 601 et seq.). A part of the AFDC program is the Work Incentive Program (WIN) established by sections 430 et seq. of the Social Security Act (42 U.S.C.A. §§ 630 et seq.). As an alternate rationale for invalidating the Virginia Work Rule in this case, the Court of Appeal concluded that " . . . by adoption of the Work Incentive Program Congress intended to preempt work rules for those in the federally assisted AFDC category. . . ." That far-reaching statement (which went far beyond that necessary to decide the case) is playing havoc with AFDC programs throughout the Nation and threatens to do so in California.

Relying on that broad statement, the federal district court in Oregon has invalidated a state rule which required employable AFDC fathers for whom there was not any available positions in WIN to accept employment. *Bueno v. Juran* (D.C. Ore. # 71-420) ..... F. Supp. ..... (dec. May 24, 1972).

In quick pursuit, a three-judge federal court in New York cited *Woolfolk* and *Bueno* and held invalid the New York rule which required employable AFDC recipients to pick up their welfare checks at the local employment office as part of the New York job-search requirement.

California has a program called Community Work Experience Programs (CWEP), which is a project designed to give job training and work experience opportunities to those employable AFDC recipients for whom there is no available opening in WIN or other manpower training program. There is pending in California the case of *Brian et al. v. CWRO et al.* (DC, CD Cal. Civil No. 72-1278-F) in which the validity of CWEP is at issue. We are told that the preemption holding of *Woolfolk* and its progeny will play a major role in the attempt to invalidate CWEP.

Thus, the alternative preemption holding of the Court of Appeals in this case has mushroomed and become the cornerstone of decisions invalidating Oregon and New York programs as well as threatening the viable employment oriented program now going on in California.

WHETHER CONGRESS HAS PREEMPTED THE FIELD OF WORK RULES PRESENTS A SUBSTANTIAL FEDERAL QUESTION

As indicated previously, the portion of the decision of the Court of Appeals in this case which is causing concern is the broad holding that Congress, by the enactment of the WIN provisions, intended to "preempt work rules for those in the federally assisted AFDC category." The validity of that conclusion presents a substantial federal question.

Initially, we point out the obvious, namely, that nothing enacted by Congress in the WIN provisions themselves or in any other statute expressly prohibits States from having rules which contain work or job-search requirements. Any federal prohibition, then, must arise by implication.

Congressional prohibition by implication is not lightly assumed. Congressional intent to preempt a field of law must be clearly and unequivocally shown. *Schwartz v. Texas,* 344 U.S. 199, 202 (1952). As stated by this Court in *Mintz v. Baldwin,* 289 U.S. 346, 350 (1933),

> "The purpose of Congress to supersede or exclude state action . . . is not lightly to be inferred. The intention so to do must definitely and clearly appear."

That general rule has direct application to the federal categorical aid programs, including the AFDC program. In *Jefferson v. Hackney,* ..... U.S. ..... (1972), this Court stated just last May that state provisions dealing with AFDC programs will not be declared invalid unless they violate a specific provision of the Constitution or the Social Security Act.

There is no clear intent to preempt state work rules evidenced by Congress in the WIN provisions. The Court of Appeal's conclusion to the contrary is based on a complete failure to perceive the WIN program in the context of its operation as funded by Congress.

The WIN program is not now, nor has it ever been, a program which offered job training or public employment to *all* employable AFDC recipients. Earlier this year, there were over 122,000 employable AFDC recipients in California. Yet there were only 18,000 WIN slots available in California. The situation was similar throughout the United States. It defies common sense to conclude that Congress, when it adopted provisions funding work and training oportunities for 18,000 employable AFDC recipients in California, intended to impliedly prohibit California from having any work or job-search requirements for the remaining 104,000 employable AFDC recipients.

The Court of Appeals, as well as the district court, appear impressed by the complete and comprehensive nature of the WIN provisions. Again the Court missed the point. Of course the WIN provisions are comprehensive. But they are only comprehensive as to those recipients for whom there are positions available in the program. The extensive WIN provisions dealing with job training, counseling and sanctions could only have application to those involved in the WIN program. It does not make sense to conclude that when Congress enacted comprehensive provisions which have a practical effect on only a small portion of the employable AFDC recipients in the State, that it intended to prohibit the State from having any work rules at all which apply to the remaining employable recipients.

Moreover, the recent amendments to the WIN program made in 1971 by the "Talmadge Amendments" (PL 92-223) make clear that Congress understands that the WIN pro-

gram is not all-encompassing. As amended, Section 433 of the Act (42 U.S.C.A. § 633) provides for priorities in the carrying out of the WIN program. Thus, in filling vacancies in the WIN program, the State is directed to give priority to unemployed fathers, volunteer mothers, other mothers, dependent children and others in that order. By recognizing the need for placement priorities for participation in the WIN program, Congress recognized that there would not be sufficient facilities in this program for all employable AFDC recipients.

As alluded to earlier, we believe the Court of Appeals went further than necessary in order to decide the case in favor of the plaintiffs. In the present case, the localities in which the plaintiffs resided were participating in the WIN program and there were vacancies in the program. However, the plaintiffs had been determined to be "inappropriate" for referral to WIN. Nevertheless, under the Virginia Work Rule, a recipient who was not appropriate for referral to WIN was required to accept employment, if offered. It is possible to reason that Congress, in enacting the WIN provisions, established, in effect, a distinction between employable AFDC recipients and unemployable AFDC recipients. It would not be unreasonable to conclude that Congress intended to prohibit the States from applying work rules to those who are unemployable under the congressionally established guidelines. But that is entirely different from concluding, as did the Court of Appeals, that Congress intended to prohibit work rules for all AFDC recipients, including those who are employable under the federal standard.

We submit that the broad holding of the Court of Appeals that Congress has preempted *all* State work rules for *all* employable AFDC recipients is wrong and, at the very least, presents a substantial federal question upon

which this Court should express its opinion, particularly in view of the fact that lower courts are blindly applying that broad statement to factual situations not at all analogous to that present here.

CONCLUSION

The problem of getting employable welfare recipients job ready, job oriented and into actual employment is one of the major problems facing our society today. It is a problem that is currently being wrestled with by Congress as well as various state legislatures and welfare departments. The holding of the Court of Appeals in this case that Congress has impliedly prohibited the States from implementing programs to supplement WIN and other limited federal manpower training programs, effectively prohibits the States from trying to solve that important problem. The validity of that decision is open to serious question and presents one of the most significant substantial federal questions to come to this Court in a long time.

We urge the Court to grant the petition for certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1971

No. 1579

OTIS L. BROWN, Director of the Department of Welfare and Institutions *et al.*,

Petitioners,

against

VIVIAN WOOLFOLK, *et al.*,

Respondents.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

BRIEF OF LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR CERTIORARI

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Interest of the *Amicus Curiae*

While the petitioners and respondents here are officials and residents of the State of Virginia and while the case involves construction of a statute of the State of Virginia, the decisions of the District Court and of the Court of Appeals for the Fourth Circuit have been cited and followed as persuasive precedent by Courts of other jurisdictions. In holding New York State's work referral amendments to the New York Social Services Law invalid as in conflict with the Federal Social Security Act, specifically those provisions relating to the WIN program (Work Incentive Program), and unconstitutional as in conflict with the

Supremacy Clause of Article VI of the Constitution of the United States, the United States District Court for the Western District of New York cited the lower Court decisions in this case as authority for its holding, although the state statutes were not the same. The State of New York is appealing that decision to this Court.

The decision in this case has been cited by Courts in jurisdictions other than New York and thus has an effect for beyond the interests of the parties to the case itself. In view of the far reaching effect of the decisions in this case, the *amicus* here urges this Court to accept jurisdiction for the purpose of construing the parameter of state authority to enact work referral programs for persons receiving public assistance in federally-aided categories.

ARGUMENT

Whether or not a statute conflicts with the Supremacy Clause of Article VI of the Constitution of the United States depends on whether Congress, expressly or by the extent of the Federal statute, has totally occupied the particular field. Where, as in the case of the WIN program, congress has provided for employment or training for only a minimal number of employable welfare recipients, it cannot have intended to so occupy the field of employment referral so as to bar State supplemental programs.

In 1971, the New York State Legislature enacted two bills providing for work referral programs and public works project employment for employable recipients of public assistance. Because of HEW objections, the public works employment provisions were not implemented as to recipients of Aid to Dependent Children (AFDC), but only as to the State's general assistance category (Home Relief

—HR), a non-federally assisted category. The work referral program generally required all unemployed employable recipients of public assistance, in both HR and ADC categories, who were not engaged in full-time vocational training programs to report semi-monthly to the State Division of Employment for job referral and manpower services. Those statutes became effective July 1, 1971.

An action was commenced in the United States District Court for the Western District of New York, by order to show cause, on July 1, 1971 seeking to invalidate New York's statutes on the ground that they violated the Thirteenth and Fourteenth Amendments to the Constitution of the United States, as well as that they conflicted with the Federal Social Security Act and thus, were in conflict with the Supremacy Clause. In its decision, dated July 28, 1972, the District Court in the New York case (*Dublino v. New York State Department of Social Services*) dismissed those causes of action which alleged a violation of the Thirteenth and Fourteenth Amendments but found that New York's work rules conflict with the Social Security Act and that the field of employment referral has been totally preempted as to Federally aided categories by the WIN program. In so holding, the Court stated:

> "Plaintiffs' second argument, that the Rules are preempted by the WIN program, has been successful in recent attacks on analogous state legislation in Virginia, see *Woolfolk* v. *Brown*, 325 F. Supp. 1162 (E. D. Va. 1971), aff'd 456 F. 2d 652 (4th Cir. 1972), and Oregon, see *Bueno* v. *Juras*, ___ F. Supp. ___ D. Ore. 1972)."

Significantly, the Oregon Court in *Bueno* based its decision on the lower court opinions in the instant case. The New York Court further cited the District Court opinion in the instant case wherein it was stated(325 F. Supp. at 1177):

> "Congress has endorsed the use of the threat of termination of subsistence level support as a means of forcing the acceptance of training or employment only when the job or the training meets specific federal requirements. State rules seeking roughly similar ends but differing sharply in means cannot coexist."

The New York Court thereupon found that it should follow the *Woolfolk* decision as enunciating the guiding general principle of law and held that New York's work rules conflicted with the Federal Act and that the entire field of employment and training of welfare recipients had been preempted by the WIN program.

Thus, all of the cases which have held state work referral programs to be invalid under the Supremacy Clause have been based on the decision in the Court below in the instant case. The issues presented to the Court in this case, therefore, extend far beyond the issue of the statute of a single state, but rather bear upon the implementation of the welfare programs and welfare reform legislation in all the states.

The primary allegation at issue in all these cases is simply that the Federal Social Security Act was intended to preempt the entire field of welfare legislation, particularly in the areas of employment referral and vocational training, and that state statutes and regulations in the same field cannot coexist. In this regard, it must be understood that a constitutional conflict does not automatically result from State and Federal legislation in the same fields. Preemption requires much more than this.

Thus, in *Huron Portland Cement Co.* v. *City of Detroit* (362 U. S. 440 [1959]), it was held that a Detroit ordinance designed for the elimination of air pollution was valid despite Federal inspection laws which prescribed the

method of construction of boilers to be used on sea-going vessels. This Court said (p. 446):

> "We conclude that there is no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance here involved. For this reason we cannot find that the federal inspection legislation has pre-empted local action. To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists. *Savage* v. *Jones,* 225 U. S. 501; *Welch Co.* v. *New Hampshire,* 306 U. S. 79; *Maurer* v. *Hamilton,* 309 U. S. 598."

"It is well settled" as the First Circuit Court of Appeals said in *Chrysler Corp.* v. *Rhodes* (416 F. 2d 319 [1969]), that "where the State's police power is concerned preemption will not be presumed" (*Engineer* v. *Chicago R. I. & R. R. Co.,* 382 U. S. 423 [1966]).

The rule as to whether a Federal law has preempted from the State the right to regulate is that *the intention to supersede the State's police powers must be clearly evidenced by the Federal legislation.* The intention to regulate exclusively will not be implied unless the Federal and State laws are inconsistent (*New Mexico Board of Examiners* v. *Roberts,* 70 N. M. 90, 370 P. 2d 811 [1962]).

The requirement, that a Congressional intent to preempt a field of legislative concern must be clearly and unequivocally shown, was forcibly stated by this Court in *Schwartz* v. *Texas* (344 U. S. 199, 202-203 [1952]):

> "If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

> "'The principle thus applicable has been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the State of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State.' *Atchinson, T. & S. F. R. Co.* v. *Railroad Commission,* 283 U. S. 380, 392-393. See *Savage* v. *Jones,* 225 U. S. 501, 533.
>
> "'It should never be held that Congress intends to supersede or by its legislation suspend that exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested.' *Reid* v. *Colorado,* 187 U. S. 137, 148."

In that case, this Court held that the Federal Communications Act, which made the disclosure of information secured by wiretaps a Federal crime, did not prevent the use of wiretap testimony in State court proceedings, even when in Federal courts such information was not considered admissible. When, eventually, wiretap evidence was held to be generally inadmissible in State court proceedings, that was done not by holding that the Federal law preempted State law, but rather under other provisions of the Constitution.

In *Florida Lime & Avocado Growers, Inc.* v. *Paul* (373 U. S. 132 [1963]), this Court held the test of preemption to be: Does the State regulation impair the Federal superintendence of the field? If there is no collision between the Federal and the State regulation, the Court said (p. 143):

> "Thus the present record demonstrates no inevitable collision between the two schemes of regulation, despite the similarity of the standards.
>
> "The issue under the head of the Supremacy Clause is narrowed then to this: Does either the nature of the

> subject matter, namely the maturity of avocados, or any explicit declaration of congressional design to displace state regulation, require § 792 to yield to the federal marketing orders?"

The Court stated as a further test of preemption (p. 141):

> "Whether a State may constitutionally reject commodities which a federal authority has certified to be marketable depends upon whether the state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines* v. *Davidowitz,* 312 U. S. 52, 67. By that test, we hold that § 792 is not such an obstacle; there is neither such actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of a congressional design to pre-empt the field."

And additionally (p. 142):

> "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."

The Federal Social Security Act does not specifically preempt the field of social welfare legislation by prohibiting state legislation in the field. In fact, the Act establishes only minimum federal requirements for State plans of assistance to certain specific categories of persons in need of assistance. That it does not cover the entire field of welfare is apparent from the fact that there are categories of aid which are totally supported (such as Home Relief) because the Congress did not see fit to legislate as to all needy persons. More importantly, this is not the first case in which the issue of preemption has been raised in regard to the Federal Social Security Act and State statutes or regulation. Both the Federal and the State

courts have considered the issue of preemption in the past, with almost uniform results.

In *Snell* v. *Wyman* (281 F. Supp. 853 [S. D. N. Y., 1968], affd. 393 U. S. 223), the Court considered a New York statute which provides for recovery of previously paid welfare benefits from assets of recipients, such as equity in real estate, bank accounts, proceeds of lawsuits or insurance policies, etc. The Court there held that the Federal Social Security Act did not prohibit such legislation, either directly or by implication, and that the State statute was not rendered invalid simply because it did not accord with the social philosophy of either the plaintiff or the Court (281 F. Supp. at p. 863).

Less than two years ago, this Court specifically held that the Federal Act did not preempt the field of welfare legislation, even in areas covered by the Federal Act itself (*Dandridge* v. *Williams*, 397 U. S. 471). In that case, holding valid a Maryland statute which set a maximum limit on the number of children in a family for which ADC would be paid, the Court held as to the power of the States to legislate (397 U. S., p. 478)

> "In *King* v. *Smith, supra* (392 U. S. 309), we stressed the States' 'undisputed power,' under these provisions of the Social Security Act, 'to set the level of benefits and the standard of need.' *Id.*, at 334. We described the AFDC enterprise as 'a scheme of cooperative federalism,' *id.*, at 316, and noted carefully that '(t)here is not question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program.' *Id.*, at 318-319. * * * Thus the starting point of the statutory analysis must be a recognition that the federal law gives each State great latitude in dispensing its available funds."

Only the instant case, relied upon by the Courts in *Dublino* and *Bueno*, has held a state work requirement to conflict with the Federal Act. Even in this case, the District Court specifically stated (325 F. Supp. at p. 1170):

> "The Court is not ruling that persons receiving assistance are without obligation to accept employment."

Although the Court in this case limited its finding of invalidity of the state statute only to those areas in which the WIN program is in effect, we submit that the Court's further finding, that employment cannot be compelled where recipients are deemed inappropriate for WIN referral due to remoteness from a WIN project, was erroneous and extended the impact of the decision far beyond the facts of the particular case. The Federal guidelines for WIN provide for the establishment of WIN projects only in areas where there are 1100 or more potential WIN referees. Thus, areas with less than 1100 employable public assistance recipients would most probably not have such a project established and the recipients in that area would be deemed inappropriate for WIN referral because of remoteness from a project. To hold that such persons could not be referred to available employment, solely because they are inappropriate for WIN because of remoteness, is contrary to the express purpose of the Federal Act itself, that is, to assist welfare recipients to attain self-sufficiency and independence and to assist them in moving from welfare rolls to payrolls.

Additionally, New York's experience with the WIN program clearly shows the lack of Congressional intent to preempt the entire field of employment placement. In New York, the WIN program is restricted geographically in the sense that it exists in only 12 of the State's 64 social services districts. *The actual designation of only 12 dis-*

tricts to operate with the WIN program was made by the Federal Secretary of Labor. The request of the New York State Department of Social Services that the United States Labor Secretary expand the WIN program by designating additional social services districts for the program has been denied. Unlike New York State's Social Services Law work referral provisions, the WIN program by federal design is restricted to specific areas of the State and as such is available only to very limited numbers of ADC recipients.

The 12 social services districts which have a WIN program in operation are also limited to a total slot allocation of 16,800. Initially, when the Program was implemented in New York in 1968 there were 14,800 slots authorized. In April 1972, the slot allocation was increased to the present level of 16,800. Under the revised WIN program, effective July 1, 1972, it is estimated there are 75,000 registered ADC recipients who are potential WIN participants but the program will not have the capacity to accommodate more than a fraction of this number. Clearly then, we must turn to other manpower programs, such as our own work referral program, if we are to meet our responsibilities, mandated under the Federal Social Security Act, to help clients become self-supporting. The disparity between the effectiveness and scope of the Federal and State programs is apparent from the fact that in the period from January through June, 1972 there were a total of 2,657 job placements under the WIN program, as compared with a total of 5,323 placements in the same period under the State's work referral program, even though the WIN program is operating in those districts having 90% of the total number of welfare recipients in the State.

In Fiscal 1971, the New York State Department of Social Services referred 17,511 individuals for participation in

the WIN program. However, in that fiscal year, the Federal government allowed only 9,600 opportunities for enrollment in the WIN program for New York State. In addition, since the State work requirement has been enacted, referrals to the State Employment Service increased twelvefold. Between November, 1971 and June, 1972, there have been approximately 125,000 referrals within the scope of seven months. Compare that figure with the yearly total referrals under the Federal WIN program:

Fiscal year	68-69	9,127
	69-70	16,992
	70-71	17,511

Not only do the Federal and State acts not conflict, they are in fact compatible in purpose and intent. This is apparent from an examination of the materials related to both programs.

The Federal Social Security Act provides that appropriations under the ADC program are made, in part, for the purpose of helping parents and relatives of needy dependent children to "attain or retain capability for the maximum self-support and personal independence" (42 U. S. C. A. § 601). State plans are specifically authorized to deny eligibility to persons who deliberately terminate employment, reduce income, or refuse job offers in the month preceding the computation of assistance (42 U. S. C. A. § 602 [a(8)]). The Federal Act, under the WIN program, provides for non-referral to that program of persons who are ill, incapacitated, of advance age, a child in full time school attendance, a person whose presence is required in the home to care for persons who are ill or incapacitated, or a person who is so remote from a WIN project as not to be able to effectively participate.

In the Congressional presentation of the Social Security Act amendments which became Public Law 92-223, Senator

Long made some significant observations on the purpose of the work referral program under the Federal Act (Congressional Record, December 14, 1971, p. S21641):

> "One final word on this amendment. As the Senate knows, we will be legislating next year on extensive changes in the welfare system. I have views of my own, as I am sure other Senators do, about what we might do to improve the welfare programs; but in the meantime, I am pleased to see the Congress take this forward step in improving the work incentive program under existing law so that it can be more effective in enabling welfare recipients to become employed. As we know from a number of studies that have been conducted by the Department of Health, Education, and Welfare, most adults in families receiving welfare would prefer to work rather than remain on welfare. It is my hope that the amendments contained in the conference report will help these recipients in their efforts to become independent—efforts that are all to often frustrated today by the welfare system that is supposed to be helping them."

The guidelines issued by the Department of Health, Education, and Welfare for the Work Incentive program clearly express the purpose of that program to be one of work referral (§ 31):

> "The purpose of the Work Incentive Program is to provide an opportunity for certain members of AFDC families, 16 and over, to be placed in paid employment immediately or to secure the necessary services to prepare them to get and hold jobs in order to become self-supporting or capable of supportng their families.
>
> "Added to the obvious desirability of an adequate income is the recognition that employment is a necessary and healthy part of family living. Many of the persons served in this program have a sense of isolation from the mainstream of American life. By entering the world of work successfully, such individuals may see themselves in a new light in relation to their own sense of worth and their standing in the commu-

> nity. The family head who gains this new respect for himself cannot help but imbue his family with it and set a pattern for a new outlook and independent living."

The State programs, too, aim at these same objectives.

We, therefore, submit to this Court that the issues presented in the application of the petitioner are sufficiently significant and of such broad application as to warrant the granting of the petition for certiorari.

CONCLUSION

The petition for certiorari should be granted.

Dated: September 23, 1972.

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